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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CARL ELSON SHRINER,

Petitioner,

-v.-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner CARL ELSON SHRINER respectfully requests that a writ of certiorari issue to review the order of the Supreme Court of the State of Florida, which affirmed the judgment of the Circuit Court of Florida, Eighth Judicial District, for Alachua County, dated April 29, 1977, and sentence to death, pursuant to Florida Statutes Sections 921.141 and 775.082.

QUESTIONS PRESENTED

1. Whether the state "scrupulously honored" petitioner's Fifth Amendment right to cut-off questioning, where, after approximately eight hours of interrogation, petitioner requested no further questioning and the interrogation merely stopped for a "minute or two" and then resumed without any additional Miranda warnings or waiver?

2. Whether the imposition of the death penalty, based on consideration of non-statutory aggravating circumstances and the exclusion of non-statutory mitigating circumstances is arbitrary and capricious as applied herein and constitutes a violation of the Eighth and Fourteenth amendment ban on cruel and unusual punishment?

3. Whether taking petitioner into custody for questioning because his appearance was similar to the description and composite police sketches of a robbery suspect violates Dunaway v. New York, 442 U.S. 200 (1979)?

4. Whether under the "totality of the circumstances" herein the confession should have been surpressed pursuant to the due process clause of the Fourteenth amendment?

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OPINION BELOW

The Supreme Court of the State of Florida affirmed the judgment in an opinion rendered on May 22, 1980, Shriner v. Florida, 1980 - Florida Law Weekly 265, ____So.2d ___(1980). The opinion is annexed hereto as Appendix "A".

JURISDICTION

The order of the Supreme Court of Florida was entered on May 22, 1980, and is annexed hereto as Appendix "A". Timely petition for rehearing was filed. On August 27, 1980, the Florida Supreme Court denied that petition in an order annexed as Appendix "B". The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATUTES INVOLVED

1. FLA. STAT. ANN §921.141 (West Supp. 1980) (Florida death statute). Set forth verbatim at Appendix "D".

2. 1979 Amendments to Section 921.141, Chapter 79-353, 1979 Florida Legislature Session Law (reflecting the death penalty statute at the time sentence was imposed herein) - annexed hereto at Appendix "E".

STATEMENT OF THE CASE

I. Overview

The petitioner, CARL ELSON SHRINER, was tried and convicted in the State of Florida for the capital offense of first degree murder, a robbery-killing of the night cashier of a Majik Mart food market, in Gainesville, Florida on October 22, 1976. Petitioner was sentenced to death on April 29, 1977 in the Alachua County Court.

There were no witnesses to the crime. Two women whom the State claimed were in the store just before the robbery-killing were unable to identify the petitioner. (T445-456)*. A 38 caliber pistol - claimed by the State's ballistics expert to be the gun which caused death - was recovered from the house (S46-56)** where petitioner was living together with others.*** What appeared to be the gun was depicted in a photo in which Carol Griffis appeared alone (T623-624) and petitioner in his oral statement stated that the gun was stolen by someone other than the petitioner and that it was often kept in Carol's car. (T692). There were no fingerprints at the scene or on the gun. (T507-620).

The state's most incriminating evidence - and the sole evidence directly linking petitioner to the killing -

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* References preceded by the letter "T" are to pages of the trial transcript.

** References preceded by the letter "S" are to pages of the suppression hearing transcript.

*** The police recovered 38 caliber bullets in the room which petitioner was sharing with his friend, Carol Griffis. Carol Griffis consented to the search of the room, as did petitioner. The Rapps consented to the search of the portion of the house where they lived. The gun was recovered in the Rapp's children's room. (S46-53).

was the petitioner's oral statement admitting the killing. This statement resulted from intensive interrogation conducted by law enforcement officials from two agencies - the Alachua County Sheriff's office and the Gainesville Police Department. These officers - sometimes working in teams of two and three and sometimes alone - interrogated petitioner between 4:20 p.m. on October 23, 1976, when he was arrested, and 4:00 a.m. the following morning - approximately 12 hours - when he was finally booked on the murder charge herein, and on the armed robbery approximately 90 minutes later at the Eight Days Inn. Petitioner had just turned 23 years of age on the date of his arrest.

The defense argued that the gun belonged to Carol Griffis, with whom he was living, and that petitioner had confessed to protect her from prosecution.* (T759,770-771). The defense called no witnesses.

II. Petitioner's Arrest and Interrogation

Prior to trial the defense moved to suppress the petitioner's incriminating statement and other incriminating evidence** on the ground that it resulted from an arrest without probable cause and that the prolonged and otherwise unlawful interrogation violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The Court conducted a pre-trial hearing on the motion and denied the motion in all respects. (S23-24, 63, 144).

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* This defense was supported by the fact that prior to 2:00 a.m. on the morning of interrogation, petitioner had maintained that he had stayed in the car while John Rapp and Carol Griffis entered the Majik Mart at the time of the robbery-killing.

** The bullets found in a leather pouch pursuant to petitioner's consent to search and a diagram of the homicide scene drawn by petitioner.

A. The Arrest

The arresting officer, Deputy William Denson, of the Alachua County Sheriff's Department, testified that prior to going on duty on October 23, 1976, he was provided a bulletin containing two composite sketches and a physical description* of a white male sought as a suspect in connection with two recent robberies and a robbery-killing. (S5).

The two composite drawings were made up by the police (S13-14) based on the information from the victims of two robberies; one at the Eight Days Inn and the other at a market at 39th Avenue in Gainesville. (S13)**.

While on patrol duty at approximately 4:15 p.m. that afternoon, Deputy Denson stopped the car in which petitioner was a passenger for the sole reason that petitioner bore a "striking resemblance" to the suspect described in the bulletin. (S7).

Petitioner was directed out of the car, informed by Denson that the reason for the stop was because petitioner fit the description in the bulletin and given the Miranda warnings.

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* The bulletin described the suspect as being a "white male, 5'8" to 5'10" tall", "approximately 150 pounds, with dark hair, collar length and flips on the end", "in...mid-twenties, pockmarks..." "pale or fair complexion and sharp facial features" and "a short trimmed goatee". (S13-14). Dress was described as "blue pullover and blue jeans." (S14).

** Petitioner was not convicted of either offense. Evidence as to the Eight Days Inn robbery was admitted at the trial on the issue of identification. This offense allegedly occurred 90 minutes after the Majik Mart robbery-killing with the same gun. Eye-witness identification of petitioner as well as petitioner's confession to the Eight Days Inn robbery were admitted into evidence over defense objection. (T398).

At trial one of the women inside Majik Mart immediately prior to the robbery-killing stated that she was not pleased with the composite that the police had put together. (T456).

Denson proceeded to conduct a field interview which consisted of questioning the petitioner with respect to his name, address, occupation* and social security number. (S8, 16, T557). Petitioner was cooperative, unevasive and responded to all questions. (T561). He identified himself and produced a valid Florida driver's license that showed his present address in Gainesville. (S16,17).

Petitioner's dress did not match the description, nor was he pockmarked and he appeared to Denson to weigh about 165 pounds. (S18, 19).

After consulation with two other law enforcement persons who responded to the stop, it was decided to take petitioner to the station "for interrogation". (S9). Petitioner was given no option. (S10). A frisk revealed no weapons. (S19). Petitioner was handcuffed, informed that he was being taken into custody "for questioning" (S10)**,placed in the rear of the patrol car and transported to the Sheriff's office. (S9). The driver of the car, John Rapp, was informed that he could follow them to the station and "if we were finished shortly, that he could give Mr. Shriner a ride back..." (S9). Upon arrival at the Sheriff's station house Denson turned the prisoner over to two investigators for questioning. (S17).

The trial court found that petitioner's resemblance to the composite and the physical description in the bulletin constituted probable cause for arrest and that the arrest

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* When asked about his occupation, petitioner stated that he was unemployed. Denson asked what petitioner normally did for a living - to which petitioner responded that he had just been released from prison in connection with an armed robbery in Miami. (S8-9).

** At trial Denson testified that "he would have to accompany me to our station for an interview..." (T558).

occurred when petitioner was cuffed and taken into custody and placed in the patrol car at about 4:20 p.m. (S23-24).

B. Interrogation

1. Alachua County Sheriff's Office Interrogation - 4:30 P.M. to 7:30 P.M.

Petitioner was questioned by numerous officers from 4:30 p.m., when he arrived at the Alachua Sheriff's office, until 7:30 p.m. when he was taken to the Gainesville Police Department for more intensive questioning concerning the robbery-killing at the Majik Mart. (S113-114). He was questioned on the Eight Days Inn robbery and Majik Mart robbery-killing during this period and denied any knowledge of either event.

During this period at the Sheriff's station house, petitioner was advised of his Miranda warnings on a single occasion - at 5:06 p.m. - by Officer McManus. McManus did not know the reason that petitioner had been brought in for questioning and, therefore, the Miranda warnings were given - and a Miranda "waiver" obtained from petitioner - without advising petitioner of the general nature of the charge about which the Sheriff's office sought to question him. (S123-124) (T568-569). McManus testified that he told petitioner at the time of the written warnings* and the signed "waiver" that he "was under suspicion of a crime being investigated by another officer". (T568-569).

Paragraph 3 of the written form states the accused's right to stop questioning "at anytime":

> If you want to answer questions now without an attorney present you still have the right to stop answering at anytime, you also have the right to stop answering at anytime that you wish to talk to a lawyer. (T568-569).

Another officer, Sgt. Murray, filled in the charge - "robbery" - when he began questioning petitioner a short time later. (T571-575). Sgt. Murray informed petitioner that he was "detained as a possible suspect" in a robbery, referring to the Eight Days Inn robbery that had occurred the morning of October 22nd. (T575). Interrogation ensued. Others participating in this phase of the interrogation included Detectives McGilvray and Price of the Gainesville Police Department. (S115). Although petitioner was allegedly charged with the Eight Days Inn robbery at the Sheriff's office shortly after 5:06 p.m., he was not booked at the jail on that charge until 4:00 a.m. the next morning, after he had confessed to the Majik Mart robbery-killing and to the Eight Days Inn robbery. (S123-124).

Petitioner testified at the suppression hearing that upon arrival at the Sheriff's office he was placed at a desk and told to write down everything he had done during the past four days. (SR5)*. He was told by an officer that if he co-operated "this whole thing could be settled and I could be on my way." (SR97).

Petitioner stated that Murray informed him that someone was on his way down to identify him** and that once that was completed, provided that he was not identified, he would be permitted to leave. (SR8,96,97). No identification was ever conducted however.

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* "SR" refers to pages of the Supplemental Record transcript, which contains petitioner's testimony at the suppression hearing.

** There was no testimony at trial with respect to an identification by one of the robbery victims on the date of petitioner's arrest. The only pre-trial identification was a photo show-up conducted months later.

2. Gainesville Police Department Interrogation - 7:30 P.M. to 4:00 A.M.

Petitioner was questioned incessantly at the Gainesville Police Department for over eight hours - from his arrival at approximately 7:30 p.m. until approximately 4:00 a.m. when he was booked. During the entire period of custodial questioning petitioner was provided no food and two cups of coffee.

At the Gainesville Police Department petitioner was advised of his Miranda warnings on one occasion - at approximately 9:17 p.m. These Miranda warnings, however, were given solely in the context of advising petitioner of his rights with respect to submitting to a ploygraph test. The form - which petitioner signed - states as follows:

> Consent To Polygraph-Lie Detector Examination
>
> I have the right to remain silent, cannot be forced or coerced in any manner to submit to this test or be required to answer any questions; that anything I say can be used in evidence against me in a court of law; that I have a right to an attorney, either retained by me or appointed by the Court if I cannot afford to hire an attorney and I have the right to talk to such attorney before saying anything or taking this examination and further that I have the right to have that attorney present with me during this examination or any interview. If I decide to answer questions now and waive my right to first talk with an attorney or have my attorney present with me during questioning, I will have the right to stop answering at any time until I talk to my attorney. Being fully aware of and understanding what my rights are, I knowingly and voluntarily waive my foregoing rights and hereby consent and agree to this examination. Absolutely no threats or promises or inducements of any kind have been made or offered to me. (S69) (85-86).

The Miranda advices in the polygraph consent form were intended by the police to apprise the accused of his rights solely with respect to submitting to the polygraph test. Sgt.

Blitch, who administered the polygraph test, and was the primary interrogator thereafter, testified:

> Q. Okay. That consent goes to the taking of a polygraph?
>
> A. This is constitutional rights and is the -- right that he will take the test.
>
> Q. It's his advising of rights concerning the taking of the test?
>
> A. That's his constitutional rights and that he'll take the test voluntarily.
>
> Q. And he'll take the test voluntarily. Okay. Did you ever advise him of his constitutional rights specifically outside the area of the polygraph?
>
> A. No. I did not. (S85-86).

This was the last time that petitioner was to receive the Miranda warnings in any context.

Petitioner testified that early that night at the police station a "Detective Price" tried to question him about the murder and that he responded that he did not want to talk to him and that he wanted an attorney present. (SR92). During this discussion the detective stated that he knew that petitioner had killed "that woman" and was "going to get me the electric chair".* (SR 92, 99). Petitioner stated that he requested an attorney several times that night.** (SR92).

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* This conversation, according to petitioner, occurred shortly after petitioner arrived at the Gainesville Police Department. Detective Price, in rebuttal, denied that he made the statement concerning the electric chair and denied that petitioner had asked him for an attorney. (S127). He stated that he saw the petitioner for the first time at 2:30 a.m. (S128).

** Petitioner's direct testimony at the suppression hearing states:

> A. Yes, I had asked to see Carol several times and I'd asked for an attorney several times too.

[footnote continued on next page]

The taped polygraph interview resulted in no incriminating statement.* (S71). The police began intensive questioning about the Majik Mart robbery-murder and the Eight Days Inn robbery upon completion of the polygraph test. No additional Miranda warnings were given. The primary interrogators were Sgt. Blitch and Assistant State Attorney Nilon. All of the interrogation occurred in the polygraph room while petitioner was cuffed to the chair. (S106). Except to go to the bathroom, petitioner did not leave that room between 9:00 p.m. and 3:30 a.m.

[footnote continued from preceeding page]

> Q. At what point in time had you asked for an attorney?
>
> A. Well, after I first got there they had me sitting out in the center and directly after that they moved me to one of the little rooms that they have partitioned off into offices and the detectives started talking to me and he just told me he was going to get me the electric chair and all this and he tried to question me about the murder, which I told him I didn't want to talk to him, that I wanted to have an attorney present.
>
> * * *
>
> Q. Did this happen at any other time?
>
> A. Well, several times whenever they started talking to me. They would start talking to me and I ended up telling them, you know, that I don't want to talk to them. Officer Murray, I told him that several times.
>
> Q. That you didn't want to talk to him?
>
> A. Yes, sir. And then he would stop talking and somebody else would come up and start talking and when I would tell them that I didn't want to talk, then someone else would come up. (SR92-93).

* The record at the suppression hearing reflects that the police administered the polygraph test that evening at approximately 9:17 p.m. The record does not reflect the results of the test nor when the test was completed. (S70). Reference to interrogation in the polygraph room during the first trial resulted in a mistrial at petitioner's request.

The polygraph room was located upstairs in the detective division at the rear of the building in a sound-proofed room approximately 10' x 10'. (S67,68).

3. Petitioner's Efforts to Stop Questioning.

Petitioner told four distinct versions of events during the period of interrogation between 7:30 p.m. and 4:00 a.m. (1) Petitioner denied any knowledge of the Majik Mart robbery-killing and the Eight Days Inn robbery from 4:30 p.m. until after completion of the polygraph test - sometime between 9:17 p.m. and 10:15 p.m. (S70, 114-115). (2) Thereafter, petitioner stated that he knew something about the Majik Mart incident and that "they" did it. He further elaborated that, not knowing at the time what had happened, he had remained in the car with the windows up listening to the stereo while "they" entered the Majik Mart on the morning of the robbery-killing and later returned to the car. Petitioner stated that he subsequently learned, through the media, that a robbery-killing occurred there that night. Petitioner refused to state who "they" were. At this time Sgt. Blitch was questioning petitioner. (S72-74). (3) At 11:30 p.m., still pursuant to questioning by Sgt. Blitch, petitioner stated that "they" were John Rapp and Carol Griffis, who resided at the same address as petitioner. Carol was petitioner's girlfriend with whom he was sharing a room at the house. Petitioner admitted that he committed the Eight Days Inn robbery later the same night, after one of the others in the car gave him the gun.* (S75, 92). (4) Finally, at 2:00 a.m., while being questioned by Sgt. Blitch alone, petitioner stated that he alone had robbed the Majik Mart and shot the cashier. Petitioner was also questioned further

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* Petitioner refused to state who handed him the gun.

with respect to the Eight Days Inn robbery by Blitch alone and by Blitch and Nilon. (T685-686) (T714, 725-726). Interrogation ceased at approximately 3:45 a.m. and petitioner was thereafter booked for both charges. (S79-80).

Immediately after the third version, wherein petitioner identified Carol Griffis and John Rapp as the persons who went into the Majik Mart, Sgt. Blitch recommended that petitioner repeat this statement to Assistant State Attorney Nilon "to hear his side of the story in case they [Carol Griffis and John Rapp] might be arrested at a later date and try to pin it on him." (S76, 94). Petitioner acquiesced. Nilon came in and petitioner repeated the statement to Nilon and Blitch.* (S76).

At 12:15 a.m. on October 24, (S78) Sgt. Blitch left the petitioner alone with Assistant State Attorney Nilon who continued the interrogation. Sgt. Blitch did not return until 1:30 a.m.** (S78).

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* Nilon testified that Blitch repeated it in petitioner's presence - asking as he went along - "is that right Carl", to which petitioner responded "yes". (S95).

** During this period that he was not interrogating petitioner, Sgt.Blitch interrogated Carol Griffis, whom the police had brought to the station house for questioning following her release from the hospital that day. (S78). Blitch described this interrogation as "without any success at all". (S78). According to Blitch she was brought into the police station sometime after 9:00 p.m. on October 23rd, the time that Blitch arrived at the station. (S87). She was very "boisterous" at the station. She was crying and upset that she did not have the pills that she took. (S88). She was being questioned in a room which petitioner would have passed on his way to the bathroom (S88) and petitioner was well aware that she was in police custody and had heard her moaning and carrying on. (SR 91, 93-94).

Assistant State Attorney Jim Nilon had arrived at the police station at approximately 8:30 - 9:00 p.m. on October 23rd, solely for purposes of this case. Although he participated in the interrogation of petitioner alone and with Sgt. Blitch, at no time did the State Attorney advise petitioner of any legal rights, nor were any such advices given to petitioner in his presence. (S103). When Nilon first spoke to petitioner, around 11:30 - 11:45 p.m. (S92), petitioner told him to put away the paper and pencil and not take any notes. (S96). Nilon never informed the defendant that anything petitioner stated orally would and could be used against him. Instead, Nilon simply complied with petitioner's request.* (S106). Nilon was "not sure" whether he was ever told that petitioner had previously been advised of his rights by others that evening. (S103). The extent of Assistant State Attorney Nilon's concern for petitioner's Fifth and Sixth Amendment rights that night is reflected in the record on cross-examination:

> Q. During the time that you were with Mr. Shriner [approximately 11:45 p.m. to 3:30 a.m.] did you advise Mr. Shriner of his constitutional rights?
>
> A. No, I did not.
>
> Q. During the time you were with Mr. Shriner did anyone else advise him of his rights in your presence?
>
> A. Not that I can think of, no sir.
>
> Q. Had you been told that anyone Mirandized him?

---

* "...I walked in there, I had the pad, I was ready to take some notes. I put down his name and Mr. Shriner said, "What are you writing?" I said "I wrote your name." He said, "You're not going to write anything down." I said, "No, I'm not going to write anything down." I put my pad up. (S104).

A. No sir. Let me take that back. I'm not sure on that. He may have been. I think I was told ... I'm not sure of this, but I think I was told he was Mirandized by the officers that arrested him as part of the robbery on the Eight Days Inn, if they had arrested him - - detained him.

Q. You think? You are not sure?

A. I'm not sure. (S103)

Petitioner made several futile attempts to exercise his Fifth Amendment privilege to cut-off questioning. Sgt. Blitch testified at the suppression hearing as follows:

Q. Did he [petitoner] ever ["during that time from nine o'clock until two thirty a.m...."] tell you he wanted to stop talking or remain silent?

A. No sir, he did not. At times he would say, "Well, I'm not going to answer that", but later he would come back and usually he would give me more than I had really anticipated." (S90).

The testimony of Assistant State Attorney Nilon reflects that petitioner futilely tried to cut-off questioning. During the first interrogation with Nilon alone, which began at approximately 12:15 a.m., after petitioner stated who "they" were, petitioner told Nilon that he did not want to answer futher questions. At this point in time petitioner had been under interrogation for eight hours.

The record at the suppression hearing reflects the following testimony on Nilon's direct examination:

Q. Did he ever ask to stop talking or remain silent?

A. Yes, to a certain extent. What he did, in the first conversation that I had with him after Investigator Blitch had left the room particularly in reference to the Eight Days Inn robbery, he told me certain things that had happened in the Eight Days Inn robbery and when I asked him particularly about the gun that he used in the Eight Days Inn robbery he said to me something to the effect, "Well, right now its like I'm crazy. It's like I'm nuts." I said, "Well, Mr. Shriner..."

I don't remember what I said but I said "It's not like you mean you are insane." He said, "No." I said "You mean you don't want to answer any more questions?" And he said, "Yes". I just sat there for a minute. I think at that point I asked him something about his family background and he answered that, and that's the only time I can think of he even alluded to the fact that he didn't want to answer any questions or make any further statements or anything." (S102).

On cross-examination at the suppression hearing, Assistant State Attorney Nilon testified:

Q. Okay, you were in there at the point in time when he's naming the "they"?

A. Yes, and the purpose was ...and before Officer Blitch left ...the purpose was so an independent witness, I guess, could be in there and we tried to encourage Mr. Shriner to write out a written statement or give us a statement that would be tape recorded to protect himself. We told him it would be in everybody's interest and if the other people, Mr. Rapp and Mrs. Griffis, gave us a statement that they would probably implicate him.

Q. But there was no written statement?

A. No written statements. (S105)

* * *

Q. All right.Let me go back to one of the statements that Mr. Shriner is giving -- and it was kind of at the end of Mr. Herbert's direct examination -- you said that during one of the times you were talking to Mr. Shriner concerning the weapon or the gun, he made the statement to you something about,"I'm crazy" or "stop." "I'm crazy."

A. Yes, sir.

Q. Kind of vague. We are not sure as to the terminology that was used. The word crazy was used, though.

A. Crazy or nuts. "It's like I'm crazy or nuts." And I interpreted that to mean, "It's like I'm not really nuts, but for your sake and, you know, in answering these questions, further questions, it's like I'm nuts to you."

Q. Was he saying he was just getting confused or tired?

A. My impression was that he was saying, like, from now on out as far as concerning the gun and specifics of the eight Days Inn robbery, it was like he was insane, that, you know, the answers would be like a crazy man. I got the impression he was saying, "Don't bother asking me any more questions about that."

Q. I believe you said on direct examination -- did he say , "I don't want to answer any more questions?"

A. He never told me specifically like, "I don't want to answer any more questions," that I can remember.

Q. Did you get the impression he didn't want to answer any more questions?

A. About that part of the incident, yes, about the Eight Days Inn and where he got the gun and things of that nature and any more specifics, yes, but then we sat there for a minute or two and I asked him some other questions. I think it was about his personal ...

Q. About his family and personal things?

A. Yes, and he just answered and we started another conversation and he had no problem.

Q. At that point he started saying, "I'm crazy. I'm nuts" or whatever it was he tried -- the point he was trying to get across to you and the fact that he seemed to want to stop answering questions in that area, did you advise him at that point in time about his rights to an attorney?

A. No sir.

Q. To your knowledge, at what time did this interview actually terminate or end with Mr. Shriner?

* * *

A. I would say probably between three and three-thirty a.m. on that Sunday morning. (S107-108)

At the trial, on direct examination, Assistant State Attorney, Nilon, re-confirmed that petitioner, at one point, had refused to answer further questions:

Q. Why did you talk -- allright. At some point he quit giving you specifics about that evening?

A. Yes.

Q. All right. The topic changes?

A. Yes, we start talking about his personal life, his family. (T709-710).

On cross-examination at trial, however, Nilon changed his testimony. His question to petitioner was no longer whether

petitioner did not want to make "any further statement..." (S101), but rather whether petitioner wanted to make no further statement "about that". (T721). Moreover, whereas at the suppression hearing the area of questioning which immediately preceded this conversation concerned the gun used in the Eight Days Inn robbery (s101), at trial Nilon stated that it was questioning concerning petitioner signing his parents' Phoenix, Arizona street residence to the motel registration folio immediately before the Eight Days Inn robbery. (T721). Nilon's record of cross-examination reads as follows:

> A. ....I started questioning Mr. Shriner about signing the registration and did he sign his address or his parents' address, and he, I don't want to say smile, but he had kind of a smirk or a grin on his face and said that "I am crazy". I said "Do you mean by that you are actually, you know, out of your mind or crazy?" And I don't remember whether he answered that or not.
>
> I said, "Well, you mean you don't want to answer any more questions about that?" and he said, "Yeah". (T721).

Confronted with petitioner's assertion of the Fifth Amendment, Nilon did not advise petitioner of his Miranda advices but, instead, simply stopped questioning on both offenses momentarily and then immediately resumed questioning in another area. Nilon's cross-examination is as follows:

> Q. He did not want to talk about that particular area, did he?
>
> A. No, he did not.
>
> Q. Now, based upon that response, did you inquire as to whether or not he wished to continue?
>
> A. No sir. At that point in time there was about a minute or two lull or lapse and that is when I started talking about personal things.
>
> Q. Okay. Then you started going on about this personal family thing?

A. Yes. At that point in time, during those conversations, I really terminated conversations about any offenses.

Q. Okay. Now, during this time, did you advise Mr. Shriner of the possibility that he had the right to have an attorney and maybe he would want one?

A. No, sir, I did not.

Q. Okay. At any time during these proceedings, did you advise Mr. Shriner of this?

A. I did not, no sir.

Q. At any time in your presence was he ever advised of this?

A. Not that I remember, no, sir.

Q. And then I believe shortly after this particular counseling that you are talking about, I believe then that Officer Blitch comes in and you leave?

A. I had some conversation after the conversation about personal things and then Officer Blitch came in and I left. (T722-723).

* * *

On redirect Nilon testified:

Q. Now, you mentioned that he mentioned to you that he didn't want to talk about it, he gave you an impression that he didn't want to talk about the specifics of the folio. Did he have any objections about going on and talking about other things?

A. Specific -- I am sorry, I don't understand.

Q. All right. Mr. Kearns talked about the thing called problems sometime - -

A. Yes.

Q. -- where the defendant said or you asked him about the folio, signing it, and he said, "I am nuts," and you said, "You just don't want to talk about it any more?" You didn't talk to him any more about the folio, is that correct?

A. No, I dropped that subject.

Q. Okay. Did he have any problem talking about anything else?

A. No, sir.

Q. Did he ever say that he didn't want to talk about anything else?

A. No, sir.

Q. Did he freely and voluntarily answer other questions that you asked him?

A. Yes, sir. As I stated before, there was about a minute or two lull period where we just sat there and I said -- well, I might have started something like, "Carl, where are you from?" And then we started about personal matters that I have already testified to. (T727-728).

The petitioner testified at the suppression hearing that he requested an attorney several times that night* and requested no further questioning. Petitioner's direct testimony reads:

A. Well, several times whenever they started talking to me. They would start talking to me and I ended up telling them, you know, that I didn't want to talk to them. Officer Murray, I told him that several times.

Q. That you didn't want to talk to him?

A. Yes, sir. And then he would stop talking and somebody else would come up and start talking and when I would tell them that I didn't want to talk, then someone else would come up. (SR92-93).

Petitioner testified that he could not recall telling Sgt. Blitch and Assistant State Attorney Nilon that he did not want to talk about the crimes without a lawyer, but he stated that he did recall making that request to others who spoke to him. (SR100-101, 103-103). Petitioner testified that he was unable to recall "half of the statements...that I was supposed to have said." (SR94). Throughout the twelve hours of questioning petitioner stated that he "kept asking for coffee".** (SR95)

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* Discussed supra at 12.

** He testified that he was provided "a couple of cups of coffee." (SR104).

Petitioner stated that he made the statements because he was "tired and upset" because they were holding Carol whom the police told him was under arrest for the murder and other offenses. (SR94, 105).

The trial court denied the defense motion to suppress the statements. The Court gave no reason and made no findings.* (S114).

4. Carol Griffis' Presence at Station House

Carol Griffis, petitioner's friend and roommate, had suffered from an apparent drug overdose and been rushed to the hospital when she lost consciousness during the search of the room she shared with petitioner. This search occurred shortly after petitioner's arrest. She had been released by the hospital later that same day to the custody of the waiting Gainesville police officers, who transported her to the station house for questioning and held her at the station during the entire period of petitioner's interrogation. According to Assistant State Attorney Nilon, on one occasion that evening, petitioner had heard her moaning. (S111). Her behavior there was described by Sgt. Murray as alternating "between being cooperative to being very uncooperative." (S121). Loud demands were made by her for the medication "quaaludes" which the police prevented her from taking. She was interrogated on the second floor in the detective section in the same squad room as petitioner, but at

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* The Court: "Motion Denied."

In its written order, dated February 7, 1977, the Court stated: "...the statements given to police officers on the night of October 23rd and the morning of the 24th, were freely and voluntarily given."

The Court granted petitioner a continuing objection at trial to the use of the evidence which he had unsuccessfully sought to suppress. (T396).

different ends of the room.* (S122). Petitioner knew that she was there. (S117-118). Petitioner stated that he saw her crying that night when he went to the bathroom. He heard her moan on one occasion, and could tell that she was upset when persons opened the door to the polygraph room. (SR91). The petitioner testified that the police told him that she was arrested for murder and possession of drugs. (SR105).

III. Bifurcated Jury Proceeding on the Death Sentence

At the bifurcated advisory jury proceeding on the death penalty the State introduced the petitioner's prior criminal record for robbery and then rested. (T872). The defense produced no evidence. (T872). The petitioner unsuccessfully sought to discharge his trial counsel. (T887-88). This request was denied. Petitioner was granted the right to argue to the jury pro se, along with his counsel. Petitioner urged the jury to recommend the death sentence. (T897).

The Court sent the case to the jury after charging them on all (seven) statutory aggravating circumstances and all (eight) statutory mitigating factors, (T898-901) even though there was supporting evidence for only two statutory aggravating circumstances. The Court directed the jury to consider all the trial evidence in reaching its decision on the sentence recommendation. No limiting instructions were given with respect to evidence concerning the Eight Days Inn robbery which had been introduced solely on the issue of identification. (T898).

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* Petitioner stated that he overheard Carol stating to a detective that for once she was telling the truth and they didn't believe her. (SR90-91). During the interrogation in the polygraph room later that evening, Det. Murray came in and told him that Carol was "throwing a tantrum about her pills", which petitioner described as "methaquaaludes", which were in her purse. (SR97). The police refused to give her the pills.

The Court instructed the jury as follows:

> If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and given that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence - which was to be imposed. (T901-902).
>
> * * *
>
> Your advisory sentence must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances. (T902).

The jury returned with a recommendation of death. (R904).

IV. Sentencing

At the sentence, petitioner withdrew his request for the death penalty stating that his remarks to the jury resulted from his being "upset on the conviction". Petitioner requested life. (Sentence Proceeding dated April 29, 1977* at 3).

At sentence the Court stated that he found the following statutory aggravating** circumstances:

> Of the guidelines in the statute for cases such as yours, you fall into at least two aggravating circumstances:
>
> One, your criminal conduct of a violent nature, namely, robbery;
>
> Second, the fact that it was apparently an offense that was committed in the attempt to escape apprehension while committing a crime. (Sentence 12).

The Court found no mitigating circumstances. (Sentence 13).

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* Hereafter referred to as "Sentence" followed by the page reference.

** Section 921.141 of the Laws of Florida, which contains the statutory aggravating and mitigating circumstances is set forth in the "Statutes Involved". The 1979 Amendments to such provisions are specifically noted.

However, in his written sentence order, dated April 29, 1977, the Court makes the following findings:

> [T]he Court finds under aggravating circumstances the following:
>
> * * *
>
> 2. Whether the defendant has previously been convicted of another capital felony or of a felony involving the use of or threat of violence to the person?
>
> The defendant ... was convicted of the offense of Armed Robbery in Dade County in 1972.
>
> * * *
>
> 4. Whether the murder for which the defendant was convicted was committed while he was engaged in the commission of or an attempt to commit ... any robbery ...?
>
> The evidence shows in this case that the Defendant killed ... [the deceased] while perpetrating robbery.

With respect to written findings of statutory mitigating circumstance the opinion states:

> The Court finds, with the possible exception of No. 6* above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case found both in the presentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to represent this defendant prior to trial, he has been disgnosed as a "sociopathic personality". An examination of these reports, however, does not lead one to the conclusion that his capacity is diminished thereby.
>
> The Court finds that the aggravating circumstances far outweigh the mitigating circumstances.
>
> (Written Sentence Order, dated April 29, 1977 at 2-3).

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* No. 6 states:

> "6. Whether the capacity of the Defendant to appreciate the ciminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

The written order of sentence reflects that the Court took into consideration, as aggravating circumstances, factors outside the scope of those provided by statute. These other factors are: petitioner's prison disciplinary record, that he is a "security risk"*, his juvenile record and crimes committed following his release from prison for which he was not convicted.

The sentence order states:

> In addition, an examination of the presentence investigation, which was made available in its entirety, including the confidential section, to the attorney for the defendant prior to sentencing, indicates that during the defendant's incarceration at the Department of Offender Rehabilitation, he has presented a discipline problem and to some degree a security risk. The investigation further shows that he has engaged in a long pattern of violent criminal conduct. In addition, it is apparent that the robbery that was committed in perpetration of the death of Judith Ann Carter was not the sole robbery committed by this defendant subsequent to his release from prison some three weeks prior to the date of the offense.
> (Sentence Order dated April 29, 1977 at 3)

V. Appeal to the Florida Supreme Court

On direct appeal to the Florida Supreme Court, petitioner argued, inter alia, that his arrest was without probable cause, that the interrogation violated his rights under the Fifth, Sixth and Fourteenth Amendments and that the Court based the death sentence on aggravating factors outside those directed by Florida statute.

The Florida Supreme Court affirmed the Court below in all respects. (The opinion is annexed as Appendix "A"**).

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* This refers to petitioner's repeated self-inflicted wounds in apparent suicide attempts during pre-trial custody herein, and to a spoon-swallowing incident while petitioner was serving his prior sentence. (Pre-sentence Investigation Report.)

** Petitioner also argued that the Florida death statute (Section 921.141) is unconstitutional on its face and as applied herein.

The Florida Supreme Court held that: (1) petitioner's "striking resemblance" to the composite drawing and description in the bulletin constituted probable cause; (2) petitioner wanted to cut off questioning only with respect to the Eight Days Inn robbery and that the "partial exercise of his Miranda privilege" was "respected" by Assistant Attorney Nilon and (3) the consideration of extra-statutory aggravating circumstances in imposing sentence is harmless error in view of the presumption of death which arises upon a finding of statutory aggravating circumstance in the absence of a finding of any statutory mitigating circumstance.

REASONS FOR GRANTING WRIT

I

The Florida Supreme Court's ruling that petitioner's right to cut-off interrogation was not violated herein conflicts with the Court's decisions in Miranda v. Arizona, 384 U.S. 436 (1966), and Michigan v. Mosley, 423 U.S. 96 (1975).

In Miranda, supra, the Court recognized an accused's right to cut-off questioning before and during interrogation:

> "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease; ...without the right to cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." Miranda v. Arizona, supra, 384 U.S. at 473-474.

The Court, in Michigan v. Mosley, supra, construed this passage of Miranda. The Court rejected the interpretation that this proscription precluded further interrogation under any circumstances. In so doing, however, the Court similarly rejected an interpretation at the other extreme, that would permit recurring rounds of questioning, which is what occurred here.

> To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned. Michigan v. Mosley, supra, 423 U.S. at 102.

The Court held that in such cases the test of admissibility is whether the authorities "scrupulously honored" the accused's right to cut-off questioning:

> We...conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether this "right to cut off questioning" was "scrupulously honored." [footnote omitted] Michigan v. Mosley, supra, 423 U.S. at 104.

The facts here do not meet that test. Prior to the confession to the homicide herein, at approximately 12:15 a.m., after approximately eight hours of non-stop questioning by successive rounds of interrogators, petitioner advised the person then interrogating him, Assistant State Attorney Nilon, that he did not wish to answer any further questions. Nilon, at the suppression hearing, testified that his questioning at that time involved the gun used in the Eight Days Inn Motel robbery and Nilon construed this request to mean that petitioner did not wish to answer any further questions in the particular area then being discussed. After a momentary pause in the questioning, Nilon resumed questioning without any additional Miranda advices, and upon resuming the questioning, initially directed his questions to an innocuous and unobjectionable area - the petitioner's family background - and, thereafter, questioning shifted back to the Majik Mart robbery-killing. Upon completion of Nilon's interrogation, at approximately 1:30 a.m., without any break, Sgt. Blitch, again took over the questioning. Nilon never told Blitch of petitioner's request. Blitch gave no new Miranda advices, but, rather at the commencement of his interrogation Sgt. Blitch intensified the pressure on petitioner by informing him, for the first time, that he

believed that petitioner was the Majik Mart robber-killer.* Pursuant to Blitch's further interrogation, at approximately 2:00 a.m., after approximately nine hours of continuous questioning, petitioner finally admitted the robbery-killing.**

The Florida Supreme Court misapplied the test laid down in Michigan v. Mosley, supra, and failed to recognize critical distinctions in the facts of Mosley. In Mosley all questioning immediately ceased when the accused invoked the Fifth Amendment. Mosley was placed in a detention cell and was not questioned again until two hours later, after fresh Miranda warnings and a clear waiver. Here, questioning merely stopped momentarily and then immediately resumed after shifting to the innocuous area of petitioner's family background. Later, the interrogation was brought back to the homicide and a confession was ultimately obtained. No new Miranda warnings were issued. No waiver inquiry was conducted. The crimes in Mosley were unrelated and the place of interrogation and the persons who conducted the interrogation were different. Here the crimes

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* During the period between 12:15 a.m. and 1:30 a.m., while Nilon was questioning petitioner alone, Sgt. Blitch was questioning the petitioner's girlfriend, Carol Griffis. Petitioner claimed, until 2:00 a.m., that she had entered the Majik Mart, together with John Rapp, while he, petitioner, had remained in the car. Petitioner asserted that he was not involved in what Griffis and Rapp did in the Majik Mart and had no knowledge before the event.

** In addition, petitioner was requested to repeat his prior admission as to the Eight Days Inn robbery.

were inseparably intertwined* and questioning occurred at the same time and place by the same interrogator. Moreover, whereas questioning in Mosley in both instances was brief, here petitioner had been questioned for approximately eight hours when the state acknowledged his request to cease questioning. Following his Fifth Amendment assertion, petitioner did not confess to the crime until the completion of that round of interrogation and commencement of the following round by a different questioner who was never apprised of petitioner's assertion.**

Thus, this is the case which Mosley is not:

> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut-off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. Michigan v. Mosley, supra, 423 U.S. 105-106.

Assistant State Attorney Nilon's disregard of petitioner's Fifth Amendment privilege was the type of conduct condemned in Mosley and should not be permitted to stand.

The Florida Supreme Court misconstrued the record to avoid the Mosley sanction of suppression. The Florida Supreme Court states:

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* So much so that all the state's evidence on the Eight Days Inn robbery - the confession and victim's testimony - was admitted on the State's prima facie case to show identification in the homicide. The same gun was involved in each crime. See opinion of Florida Supreme Court at 3,Appendix "A".

** The record is unclear as to the exact time lapse between petitioner's request to stop and his confession. Nilon began questioning petitioner alone at approximately 12:15 a.m. and Blitch began at approximately 1:30 a.m. Petitioner confessed at approximately 2:00 a.m. The request to stop occurred sometime during Nilon's questioning.

> We are satisfied that, based on Mr. Nilon's testimony and the absence of rebuttal evidence to the contrary, the trial judge correctly concluded that appellant wanted to terminate questioning only insofar as it related to the Right Days Inn robbery. We are similarly satisfied that Mr. Nilon respected appellant's partial exercise of his Miranda privilege and restricted further questioning to other areas.*

The record at the suppression hearing reflects that petitioner requested all questioning to cease - not just questioning related to the Eight Days Inn robbery. The testimony of Assistant State Attorney Nilon on direct examination at the suppression hearing establishes this:

> Q. Did he ever ask to stop talking or remain silent?
>
> A. Yes, to a certain extent. What he did in the first conversation that I had with him after Investigator Blitch had left the room, particularly in reference to the Eight Days Inn robbery, he told me certain things that had happened in the Eight Days Inn robbery and when I asked him particularly about the gun that he used in the Eight Days Inn robbery he said to me something to the effect, "Well, right now it's like I'm crazy. It's like I'm nuts." I said, "Well, Mr. Shriner..." I don't remember what I said, but I said, "It's not like you mean you are insane." He said "No". I said "You mean you don't want to answer any more questions? And he said, "Yes". I just sat there for a minute. I think at that point I asked him something about his family background and he answered that, and that's the only time I can think of he even alluded to the fact that he didn't want to answer any questions or make any further statements or anything. (Emphasis added) (S102).

The petitioner's affirmative response to the question "Do you mean you don't want to answer any more questions?" is the exercise of his Fifth Amendment privilege to stop the inter-

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* In a footnote the Florida Supreme Court at n.9 (See Appendix "A") states:

> ...[T]his record is bare of any perfidious police practices. And considering the lack of contradictory evidence in Shriner's testimony at the motion to suppress, we would be irresponsible to overturn the trial judge's finding of voluntariness.

rogation. To construe this unequivocal response to refer only to the particular subject matter then under discussion eliminates the Fifth Amendment privilege to cut-off questioning, since such an assertion will always be in response to a particular question in a particular area. This construction thus would place the burden on the accused to repeatedly assert the privilege each time that questioning shifted to a different area. This construction was rejected in Michigan v. Mosley, supra.

> To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned. Michigan v. Mosley, supra, 423 U.S. at 102

Petitioner's clear expression that he did not wish to answer "any more questions" should not be superseded and nullified by Nilon's testimony, on cross-examination at the suppression hearing, with respect to the operations of Nilon's mind in construing petitioner's request:

> A. My impression was that he was saying, like from now on out as far as concerning the gun and specifics of the Eight Days Inn robbery, it was like he was insane, that, you know, the answers he was saying, "Don't bother asking me any more questions about that." (S107-108). (Emphasis added.)

This is especially true since Nilon changed his testimony in this critical area at the trial. Thus, while the questioning which precipated petitioner's request related to the gun used in the Eight Days Inn robbery, according to Nilon's suppression hearing testimony, at trial Nilon stated that it occurred when he was questioning petitioner about signing his parent's Arizona address to the motel register. Moreover, at the trial Nilon's

question to petitioner was no longer whether petitioner "didn't want to answer any questions or make any further statement...?" (S102) but, rather, whether petitioner did not "want to answer any more questions about that?" (T721). (Emphasis added).

> A. ...I started questioning Mr. Shriner about signing the registration and did he sign his address or his parents' address, and he, I don't want to say smile, but he had kind of a smirk or a grin on his face and said that "I am crazy". I said, "Do you mean by that that you are actually, you know, out of your mind or crazy?" And I don't remember whether he answered that or not.
>
> I said, "Well, you mean you don't want to answer any more questions about that?" and he said "Yeah". (T721).

Thus, the Florida Supreme Court's ruling that petitioner expressed the desire to stop questioning "only insofar as it related to the Right Days Inn robbery" is not supported by the record. The Florida Supreme Court focused on Nilon's impression of what petitioner meant - rather than on what petitioner said.

The assertion by the Florida Supreme Court that petitioner offered no contradictory evidence at the suppression hearing is misleading and shows a shift in the burden of proof. Petitioner testified that on several occasions during the interrogation at the Gainesville police station he stated that he wanted to talk to a lawyer and did not wish to answer questions. Petitioner candidly testified that he was unable to remember whether he made such requests to Nilon and Blitch - who questioned him during the last six hours - because he was so tired and upset. The Court's reference to petitioner's "absence of rebuttal" and "lack of contradictory evidence" is therefore misleading. While it is true that petitioner's inability to recall the incident

precluded specific contradiction of Nilon's testimony petitioner testified that he made such assertions on numerous occasions to numerous interrogators - of which Nilon may be one - during the eight hours that preceded the confession to the homicide. More importantly, however, by placing emphasis on the absence of rebuttal by petitioner, the Florida Supreme Court has shifted the burden of proof on the waiver issue to the petitioner, rather than holding the State to its heavy burden.* Miranda v. Arizona, supra, 384 U.S. at 475.

Moreover, even accepting what petitioner maintains is the Florida Supreme Court's erroneous interpretation** of petitioner's assertion of his Fifth Amendment privilege, it is beyond dispute that petitioner expressly invoked his Fifth Amendment privilege in some manner***, which should have been sufficient to require Nilon to cease questioning. At the very least it should have been sufficient to put the Assistant State Attorney on notice to inquire whether petitioner wished to stop all questioning or only those in a particular area, i.e. to

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* As opposed to indulging "in every reasonable presumption against waiver". Brewer v. Williams, 430 U.S. 387,404. (1977).

** That petitioner only wanted to stop questioning about the Eight Days Inn robbery.

*** In Miranda v. Arizona, supra, the Court stated:

> Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. Miranda v. Arizona, supra, 384 U.S. at 473-474.

clarify the scope of permissible questioning. Thompson v. Wainwright, 601 F.2d. 768 (5th Cir. 1979): Nash v. Estelle, 597 F.2d. 513 (5th Cir. 1979), cert. denied 444 U.S. 981 (1980)*. Such an inquiry should have been coupled with fresh Miranda advices, as in Michigan v. Mosley, supra, and further interrogation should not have proceeded in the absence of a clear and intelligent waiver.

The record here is one of scrupulous disregard and indifference to petitioner's Miranda rights. The Assistant State Attorney who participated in the all-night interrogation from 11:30 p.m. to after 3:30 a.m. never once informed the defendant of his Miranda warnings nor were such warnings given in his presence. He could not even recall anyone that night informing him that petitioner had been given his Miranda advices. During the eight hours of interrogation at the Gainesville Police Station the only Miranda warnings that petitioner received were those administered at 9:00 p.m. in the context of voluntarily taking the polygraph test in the absence of counsel, which petitioner agreed to do. No additional warnings were given** prior to the most intensive period of

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* Both these cases involved a request for counsel during interrogation. Since such a request is determined at this pre-proceeding stage by Fifth Amendment standards it should apply here as well. Brewer v. Williams, 430 U.S. 387 (1977). The State has the burden to prove "an intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

** It should be further noted that in connection with the Miranda warnings given at approximately 5:00 p.m., shortly after petitioner's arrest, the person who administered the warnings and elicited petitioner's written "waiver", did not know and, therefore, did not advise petitioner of the nature of the charge on which questioning was sought. It was not until Sgt. Murray began questioning a short time later that petitioner was informed that the advices were given in connection with the Eight Days Inn robbery. Although Murray also questioned petitioner concerning the Majik Mart robbery-killing no additional warnings or separate waiver for such questioning was obtained.

interrogation which immediately followed completion of the polygraph test.

Lastly, the Florida Supreme Court is simply wrong when it states that "Nilon respected appellant's partial exercise of his Miranda privilege and restricted further questioning to other areas." (Opinion at 3, Appendix " A "). This is refuted by the trial record. Both Blitch and Nilon testified that petitioner was re-questioned on the Eight Days Inn robbery during his last oral statement, which the police obtained between 1:45 a.m. and 3:00 a.m. (Blitch T685-686). (Nilon T714, 725-726).

The Florida Supreme Court's ruling that petitioner's right to cut-off questioning meets the "scrupulously honored" test laid down in Michigan v. Mosley, supra, should be reviewed.

II.

The imposition of the death penalty herein based on consideration of factors other than the statutory aggravating factors in §921.141,* and excluding consideration of non-statutory mitigating circumstances, is arbitrary and capricious and constitutes a violation of the Eighth and Fourteenth Amendment ban on cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238 (1972); Lockett v. Ohio, 438 U.S. 586 (1978).

The record reflects that the sentencing court found two statutory aggravating circumstances; that the petitioner had a prior record for robbery, a felony involving violence,

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* This is the Florida death sentence statute. FLA. STAT. ANN. §921.141 (West Supp. 1980). It is set forth in its present form at Appendix "D". The 1979 amendments are annexed at Appendix E, discussed infra at 47-48.

and that the killing occurred during the commission of a robbery. The sentencing court found no statutory mitigating circumstances. The record reflects that the sentencing court additionally considered the following non-statutory aggravating circumstances: (1) petitioner's extensive record as a juvenile delinquent between 1963 and 1971; (2) petitioner's extensive prison disciplinary record between 1972 and 1976; (3) the "likely" commission of five robberies for which petitioner was not convicted; and (4) petitioner's repeated self-inflicted wounds, in apparent suicide attempts, while detained on the within charge. (Sentence 10-14). See also written sentenced order, dated April 29, 1977, annexed at Appendix "C".

The trial court found that there were no statutory mitigating circumstances. (Sentence 13) (Sentence order at 3, annexed at Appendix "C"). The record reflects that neither the jury nor the court at sentence considered non-statutory mitigating circumstances. (See sentence order at 3, annexed hereto at Appendix "C"). The jury, in fact, was expressly precluded from such consideration being instructed to only consider what was specified by the statute.* (T900-901).

The Florida Supreme Court, in answer to petitioner's contention that it was unconstitutional to consider non-statutory

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* Appellant raised below the constitutionality of the refusal to permit the jury to consider non-statutory mitigating factors in the context of the trial court's refusal to permit the testimony of a clergyman who had witnessed three electrocutions. The Supreme Court of Florida held that such testimony was not relevant to the sentence phase. The petitioner also contended below that the Florida death penalty statute on its face and as applied herein is unconstitutional. The Florida Supreme Court considered and rejected this contention. See Opinion at 4, Appendix "A".

aggravating factors, held that it was not "clear" that the court considered such factors, but that assuming that it did, the error was harmless since death is presumed where statutory aggravating circumstances are present and statutory mitigating circumstances are not.*

The Florida Supreme Court's refusal to acknowledge the sentencing court's consideration of the non-statutory aggravating circumstances is disingenuous. The record reflects that the court not only considered such factors but, relied on them more heavily than the statutory aggravating circumstances.

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* The Florida Supreme Court's opinion states as follows:

> As a preliminary matter, the record is replete with evidence to support the judge's finding of aggravating circumstances numbered two and four [footnote omitted]. The record also supports the finding of no mitigating circumstances. It is not clear, however, whether the judge considered appellant's disciplinary record as an aggravating circumstance. Even if we assume that the disciplinary problem was so treated, the error was harmless. We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation, [footnote omitted] improper consideration of a non-statutory factor does not render the sentence invalid:
>
> > It appears that the United States Supreme Court does not fault a death sentence predicated in part upon non-statutory aggravating factors <u>where there are no mitigating circumstances.</u> The absence of mitigating circumstances became important, because so long as there are some statutory aggravating circumstances, there is no danger that non-statutory circumstances have served to overcome the mitigating circumstances in the weighing process, which is dictated by our statute. <u>Elledge v. State</u>, 346 So. 2d 998, 1002-03 (Fla. 1977). (Emphasis in original) Opinion at 5, Appendix "A".

The court at sentence had two options: life imprisonment or death. The remarks of the court at sentence thus must be understood as responding to the plea made by petitioner and his counsel for imposition of a life sentence rather than death. Petitioner's extensive prior disciplinary record, his repeated self-inflicted wounds and the spoon swallowing incident were relied on by the court in rejecting the life sentence alternative. The court stated, in imposing sentence:

> The fact that your infractions, while you were in the penitentiary, and the nature of those, tells me that a life sentence, with a minimum of 25, would be no answer in your case.
>
> Accordingly, I order that you be taken by the proper authorities to the Florida State Prison and kept there in close confinement until the date of your execution is set. (Sentence 13).

Similarly, petitioner's extensive record as a juvenile delinquent, and the claim that he had committed five robberies between October 1, 1976 and October 23, 1976, for which he had not been convicted, were considered and relied on by the court in rejecting the life sentence alternative which would make petitioner eligible for parole in twenty-five years.

> ...Your presentence investigation shows you had a history of robbery, history of institutionalization on a juvenile basis for many, many years.
>
> * * *
>
> Your presentence investigation shows that while you were in prison, you continued to have disciplinary infractions, that upon your first condition of release you lasted three weeks before it was revoked.
>
> Your presentence investigation also shows that it is likely that you committed at least four robberies besides the one that was proved as collateral fact evidence in your murder case, ...all within... three weeks of your release. (Sentence at 11-12).

Accordingly, the record at sentence refutes the Florida Supreme Court's contention that it is not "clear" that the sentencing court considered such non-statutory aggravating factors.

Consideration of non-statutory aggravating circumstances destroys the uniformity of application which the Court sought to foster in Furman v. Georgia, supra, which held that unbridled discretion in imposing the death sentence is unconstitutional. In fact, it was in response to Furman that the Florida State Legislature enacted Section 921.141 and expressly limited* the court's and jury's consideration to the statutory aggravating circumstances in imposing the death sentence. Permitting imposition of the death penalty based on particular aggravating circumstances falling outside the statute, which happen to strike a particular judge as relevant - which is what happened here - is a return to the unbridled, unconstitutional scheme which was condemned in Furman v. Georgia, supra.

Consideration of non-statutory aggravating factors was particularly prejudicial here for other reasons. The presentence investigation report indicates that petitioner has an extensive juvenile record in the state of Ohio between 1963 [when he first was placed in custody as a juvenile at the age of 10] and 1971. In re Gault, 387 U.S. 1, (1967) is a landmark case wherein the Court held under the due process clause that juveniles must be

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* Section 921.141(5) provided that "[a]ggravating circumstances shall be limited" to those provided by statute. The statute in its present form is annexed at Appendix "D". To see it in its form at sentence herein see 1979 amendments annexed as "E", discussed infra at 47-48.

accorded certain fundamental due process rights, including notice of the charges, counsel if indigent, a written record for review, the privilege against self-incrimination and the right to confront and cross-examine witnesses. In re Winship*, 397 U.S. 358 1970) held that proof beyond a reasonable doubt is required under the due process clause in juvenile delinquency proceedings. These landmark cases were considered a radical departure from existing juvenile offender laws in most, if not all states, and such was the case in Ohio where the petitioner's juvenile delinquent record arose. See e.g. Cope v. Campell, 175 Ohio St. 475, 196 N.E.2d 457 (1964) (no right to counsel); State v. Shardell, 107 Ohio App. 338, 153 N.E.2d 510 (1958) (no privilege against self-incrimination); in re Angler, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969) (no proof beyond a reasonable doubt standard). For this reason, most, if not all, petitioner's juvenile delinquent adjudications, which the court relied on at sentence, are unconstitutional. The consideration of these adjudications constitutes a violation of due process in ordinary felony cases. Burgett v. Texas, 389 U.S. 109 (1967); United States v. Tucker, 405 U.S. 443 (1972). No lesser standard should apply here where the ultimate sentence of death is involved.

Similar problems exist with the sentencing court's consideration of petitioner's prison disciplinary record which arose between 1972 and 1976. These infractions involved loss of good time and 'disciplinary confinement." In Wolff v. McDonnell, 418 U.S. 539 (1974) the Court held that the due

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* Held retroactive in Ivan V. v. New York, 407 U.S. 203 (1971).

process clause of the Constitution required that in prison disciplinary matters for which a sanction of solitary confinement or loss of good time could be imposed, a hearing must be held, that written notice of the charge must be provided at least twenty-four hours before the hearing, and that thereafter the inmate must be provided a written statement specifying the evidence relied on and the reasons for the disciplinary action taken. This too, at the time, was considered a radical departure from existing prison disciplinary proceedings in most, if not all, states and such was the case in Florida where petitioner was imprisoned. No such provisons existed in Florida prior to Wolff and they were not enacted by the Florida legislature until 1975. (See Chapter 945.21 Florida Session Laws 1975). [The latter provisions were found partially inadequate under Wolff in Myers v. Askew, 338 So.2d 1128 (Fla. App. 4th District 1976) (no requirement of a statement of evidence relied on)]. For this reason, most, if not all of the matters on which petitioner was disciplined between 1971 and 1976 do not pass constitutional muster and therefore should not have been considered. Burgett v. Texas, supra; United States v. Tucker, supra.*

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* While the Court in Wolff, for policy reasons held that the new minimal due process standards were not retroactive, id did so for reasons which have no application here: The Court in Wolff stated:

> [a]lthough such new procedures relate to] the integrity of the fact finding process in the context of disciplinary proceedings, where less is generally at stake for an individual than at a ciminal trial, great weight should be given to the significant impact a retroactivity ruling would have in the administration of all prisons in the country... Wolff v. McDonnell, supra, 418 U.S. at 573-574.

The Court's consideration - as a non-statutory aggravating circumstance - of petitioner's self-inflicted wounds, during apparent suicide attempts, and a spoon-swallowing incident which required surgery, are symptons of mental illness and emotional instability. The imposition of the death sentence based in part on petitioner's mental sickness is a gross violation of due process and should be recognized as such. See Robinson v. California, 370 U.S. 660 (1962) (unconstitutionality of California statute making narcotics addiction a criminal offense.)

The Florida Supreme Court indicates, however, that even if it was wrong to consider such non-statutory aggravating factors, the error was harmless. The Florida Supreme Court bases this holding on the presumption of death, which it states arises from the finding of statutory aggravating circumstances in the absence of statutory mitigating circumstances. This presumption violates Lockett v. Ohio*, supra.

Petitioner was sentence prior to Lockett. Under the law then prevailing in Florida, it was unlawful for the jury or the sentencing court to consider non-statutory

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* In Lockett v. Ohio, the Court held:

> That the Eighth and Fourteenth Amendments require that the sentences, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, and aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. at , 98 S.Ct. at 2965 (plurality opinion) (Emphasis in original).

mitigating circumstances. Cooper v. State,* 336 So.2d 1133 (Fla. 1976) (per curiam) cert. denied, 431 U.S. 925 (1977). In reliance on Cooper the trial court here expressly limited the jury's consideration - at the advisory sentence phase - to the statutory circumstances - both aggravating and mitigating.** (T900-901). The Court applied the same proceedure in imposing sentence. See written sentence order at 2-3, annexed at Appendix "C". However, while this case was on appeal to the Florida Supreme Court, that court in Songer v. State, 365 So.2d 696 (Fla. 1978) (per curiam) acknowledged that Florida's statutory scheme would be invalid under the Court's then recent opinion in Lockett v. Ohio, supra, if construed to preclude consideration of non-statutory mitigating factors. The Florida Supreme Court then went to great lengths to distinguish Cooper, supra, concluding that the statute had not been so construed.***

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* In relevant part the Florida Supreme Court there stated:

> [T]he Legislature chose to list the mitigating circumstances which it judged to be relevant for determining the appropriateness of a death penalty... and we are not free to expand the list. Cooper v. State, supra, 335 So.2d at 1139.

** This error at the jury advisory sentence phase is gravely prejudicial since, under Florida law, a judge may override a jury's recommendation of life imprisonment only on facts "so clear and convincing that no reasonable person could differ". Dobbert v. Florida, 432 U.S. 282 (1977) (citing Tedder v. State, 322 So.2d 908-910 (1975).

*** The Court in Songer strained to distinguish Cooper on the facts, stating that Cooper held only that "irrelevant" evidence shoud be excluded. Songer v. State, supra, 365 So.2d 696 at 700 (Fla. 1978).

Regardless of the Florida Supreme Court's statement in Songer that the Florida death statute had not been interpreted to preclude consideration of non-statutory mitigating circumstances - a statement which petitioner maintains is clearly wrong in view of Cooper - the undeniable fact exists here that the trial court did expressly limit the jury's consideration at the sentence phase to the statutory mitigating circumstances.* The record reflects that at sentence the Court did the same.** It should further be noted that the Florida death penalty statute was amended in 1979 by the state legislature to effect this change required under Lockett. The legislature excluded the words "limiting consideration to statutory mitigating factors" at Section 921.141(3) (b), and, additionally, provided for consideration of "the nature of the crime and the character of the defendant" at Section 921.141(1).

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* The Court instructed the jury that:

> The mitigating circumstances you may consider, established by the evidence, are as follows: (T900)
>
> (Thereafter the Court read the jury the seven statutory mitigating provisions of Section 921.141(6)). (T900-901).

** The sentence order states:

> The following are statutory mitigating circumstances which have been considered.
>
> [The court then enumerates the statutory mitigating circumstances]
>
> The Court finds with the possible exception of No. 6 above, (substantial impairment of capacity to appreciate criminality of conduct or to conform conduct to law) there are no mitigating circumstances in this case.
>
> [The Court then proceeds to state in further detail why No. 6 is not present here). (Sentence order at 2-3, annexed at Appendix "C").

If this was the law prior to Lockett - as the Florida Supreme Court states in Songer - such amendments would not have been needed. The petitioner's sentence occurred in 1977, after the Cooper decision and before Lockett, which gave rise to the amendments at the 1979 session of the Florida legislature. (See 1979 Session Law, Chapter 70-353, annexed hereto at Appendix "E".

The record reflects* the following mitigating (non-statutory) circumstances which the jury and the sentencing court did not consider: (1) on the date of the murder, petitioner had been drinking and taking drugs, 4 to 5 beers, 8 to 9 rum, speed and marijuana; (2) petitioner was the seventh of ten children and "yanked up by the hair of the head rather than reared" (Psychological Screening Report); (3) petitioner has and I.Q. of 121 and a superior learning ability; and (4) the self-inflicted wounds are evidence of severe emotional and mental problems.

It was wrong for the court to consider the non-statutory aggravating circumstances which give rise to "unbridled discretion", condemned in Furman v. Georgia, supra, and which otherwise are improper basis for enhancement of punishment. That alone warrants vacating the death sentence. It was also wrong to exclude consideration of non-statutory mitigating circumstances under Lockett v. Ohio, supra. This too, standing alone, warrants setting aside the sentence. Coupled together these errors constitute a gross violation of

* The mitigating factors stated here are based on information in the pre-sentence report. There undoubtedly would have been others developed by defense counsel had the practice then been to permit jury and court consideration of non-statutory mitigating factors.

Eighth and Fourteenth Amendments. The Florida Supreme Court's contention such error is "harmless" is in conflict with the decisions of this Court and ought to be reviewed.

III.

The Florida Supreme Court's finding that petitioner's "striking resemblance"* to the composite drawings in a police bulletin provided probable cause to take petitioner into custody for questioning, conflicts with the Court's decision in Dunaway v. New York, 442 U.S. 200 (1979)**

In Dunaway, supra, the Court condemned the police practice of picking a person up for questioning on less than probable cause, and taking him to the station house for custodial questioning. Such interrogation, the Court held, must be premised on a lawful arrest based on probable cause.*** The Court stated:

> "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." Dunaway v. New York, supra, 442 U.S. at ____, quoting from Henry v. United States, 361 U.S. 98 (1950).

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* The Florida Supreme Court held:

> ...[T]he sketches attached to the police BOLO [Be On The Lookout Bulletin] bore a striking resemblance to appellant, thus furnishing Deputy Denson with reasonable grounds to believe that appellant had committed the robberies. Opinion at 1, annexed to Appendix at "A".

** Both sides below briefed the case herein before the Supreme Court of Florida prior to the Court's decision in Dunaway. The Florida Supreme Court's opinion herein, dated May 22, 1980, makes no reference to the Dunaway decision. There is therefore no indication that the Florida Supreme Court ever considered Dunaway in reaching its decision.

*** The probable cause standard is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense'". Beck v. Ohio, 379 U.S. 89, 91 (1964). See also, Henry v. United States, 361 U.S. 98, (1959); Brinegar v. United States, 338 U.S. 160, 175-76,

In Dunaway the respondent, State of New York, conceded the absence of probable cause to arrest - arguing instead that such investigative seizure was not within the purview of the Fourth Amendment. The police in Dunaway had more information implicating Irving Dunaway than Deputy Denson had with respect to the seizure of petitioner for questioning herein. In Dunaway, the police had spoken to two named individuals who had implicated a person named "Irving" in the commission of the homicide. In addition, an informant had picked out a mug shot of the defendant, Irving Dunaway, as a person known to the deceased. Dunaway v. New York, ___U.S. ___, 99 S.Ct. 2248, 2251 n. 1. Here the sole basis for taking petitioner in for questioning was his "resemblance" to the composite drawings and general terms of the physical description in the police bulletin. Such information is not adequately "supported by probable cause particularized to that person." Ybarra v. Illinois, ___U.S. ___, 100 S. Ct. 338 at 342 (1979) (Emphasis added). That information would not have warranted the issuance of an arrest warrant by an impartial magistrate and a fortiori is an inadequate basis for a warrantless arrest.*

The record here is replete with references indicitative of the fact that petitioner was taken into custody by the authorities solely "for questioning". (S10). The arresting officer so testified. (S10). At the time that petitioner was cuffed and placed in the police car, Deputy Denson told

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* The strong traditional preference for warrants requires that the probable cause standard for a warrantless arrest should be no less stringent. Beck v. Ohio, 379 U.S. 89 (1964).

John Rapp, the driver of the car, that he could follow them to the Sheriff's office so that he could drive the petitioner home upon his release. (S9). Moreover, Officer McManus testified that he informed petitioner at the station house that he "was under suspicion of a crime being investigated by another officer". (T568-569). At no time was he told that he was under arrest. Similarly, the officer in charge of the Eight Days Inn investigation, Sgt. Murray, who questioned petitioner at great length at the Sheriff's office, testified that he informed petitioner that he was "detained as a possible suspect" in a robbery. (T575). Petitioner testified at the suppression hearing that he was told that if he cooperated "this whole thing could be settled and I could be on my way." (SR97). Petitioner stated that Murray told him that someone was on his way to the station house to identify him, and that if such person couldn't, petitioner would be permitted to leave. (SR96-97). Assistant State Attorney Nilon, one of the primary participants in this investigation, corrected himself with respect to the use of the term "arrest":

> Q. Had you been told that anyone had Mirandized him?
>
> A. No sir, let me take that back. I'm not sure on that. He may have been. I think I was told...I'm not sure of this, but I think I was told he was Mirandized by the officers that arrested him as part of the robbery on the Eight Days Inn, -- if they had arrested him -- detained him. (S103) (Emphasis added)

As in Dunaway, the law enforcement officers embarked upon an "expedition for evidence... in the hope that something might turn up". Dunaway v. New York, supra, ____U.S. at ___, 99 S. Ct. at 2259. This is confirmed in the testimony of Sgt. Blitch with reference to petitioner's earlier denial of any involvement:

> ...I felt that he was concealing facts around the case and I continued talking to him to try to obtain these facts. (T675).

Here, as in Dunaway, the fruits of the unlawful detention - the petitioner's incriminating statements, the discovery of petitioner's Arizona driver's license with the address matching the one given by the person who robbed the Eight Days Inn, the consent to search and the evidence obtained as a result thereof, (the 38 caliber cartidges) as well as the petitioner's sketch of the store, must be suppressed since they were obtained through direct exploitation of the illegal arrest. Davis v. Mississippi, 394 U.S. 723 (1969); Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1929). This is so regardless of whether the Court finds - contrary to petitioner's contention - that petitioner's right to cut-off questioning was "scrupulously honored." Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, supra.

IV.

Under the "totality of the circumstances" the confession obtained following more than eleven hours of intensive interrogation was involuntary and should have been suppressed as violative of the due process clause of the Fourteenth Amendment. Spano v. New York, 360 U.S. 315 (1959); Chambers v. Florida, 309 U.S.227 (1940).

Petitioner was questioned without stop from 4:30 p.m. until approximately 4:00 a.m. Two law enforcement agencies, in addition to the State Attorney's office, worked in teams and sometimes alone to put pressure on petitioner to confess. The intensified pressure on petitioner as the evening ran into morning is reflected in the four separate statements that petitioner gave. Petitioner initially denied any knowledge of the offenses under investigation, however, after about five hours of questioning, he relented and stated that he did know something. This change in position followed completion of a lie detector test. For the next two hours petitioner stated that "they" did it while he waited in the car. As the pressure became greater petitioner admitted to the lesser offense - the armed robbery of the Eight Days Inn, still maintaining his innocence as to the robbery-killing herein. Still greater pressure led petitioner to state who "they" were at approximately 11:30 p.m. The authorities did not believe this version however and pressed still further. Finally, at approximately 2:00 a.m., petitioner admitted that he alone had committed the robbery-killing.

The record reflects that during this period the authorities showed no regard for petitioner's Miranda rights. Petitioner was given the Miranda warnings shortly after his arrest by an officer who was unfamiliar with the reason that petitioner was in custody. As a result, petitioner was not informed of the nature of the charge on which such rights were given. Nonetheless, the authorities obtained a waiver of rights. It was not until questioning began by the officer in charge of the Eight Days Inn robbery investigation that the nature of the charge -"robbery" - was filled in on petitioner's written Miranda waiver form. Although the "robbery" presumably referred to the Eight Days Inn, the authorities questioned petitioner without any additional Miranda advices with respect to the robbery-killing herein. Petitioner testified that his repeated requests for counsel and the end of questioning were met simply by a fresh team of interrogators.

Petitioner was taken to the Gainesville police station at 7:30 p.m. primarily for purposes of interrogation on the robbery-killing which fell within their jurisdiction. He was questioned there approximately an hour and a half before any Miranda warnings were given. Moreover, the warnings given were solely in the context of submitting to the polygraph test which petitioner agreed to take. Petitioner was given no additional warnings upon completion of the polygraph test when intensive interrogation by Sgt. Blitch and Assistant State Attorney Nilon commenced.

During the period from 9:00 p.m. until approximately 3:30 a.m. petitioner was interrogated in a 10' x 10' polygraph room. He was handcuffed to the chair at all times, except when permitted to leave to go to the bathroom. During the entire period of custodial interrogation - approximately 12 hours - he was given two cups of coffee and nothing to eat.

Additional pressure was placed on petitioner when the police brought his girlfriend, Carol Griffis, to the station house. She had fainted and required emergency medical treatment during the search of the house at approximately 5:00 p.m. She was taken to the hospital and then released to the police who brought her direct to the station house for questioning. Carol was loud and very emotional during the entire period that she was questioned. Petitioner could hear her whenever the door to the polygraph room opened and was concerned for Carol's welfare. The police told petitioner that Carol had been arrested for the murder herein. This was a device to compel a further statement from petitioner, which finally succeeded.

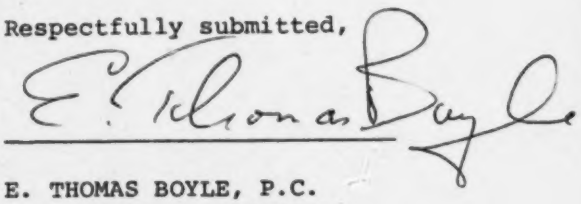
During this interrogation petitioner testified that he made repeated requests that questioning stop. Sgt. Blitch and Assistant State Attorney Nilon acknowledged such requests but did not honor them. Instead each shifted questioning momentarily to another area and then came back around to the area sought. No fresh Miranda warnings were given and no waiver was sought. Petitioner's will to resist was eventually worn down by the authorities' presistent questioning.

The Florida Supreme Court does not address this issue raised by petitioner below. That decision should be reviewed by the Court to determine whether the confession obtained herein is involuntary under all the circumstances herein.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,



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Dated: Smithtown, New York
October 24, 1980

No. 22
May 30, 1980

SUPREME CO'RT OPINIONS

Criminal Law—Murder—Death Penalty—Probable Cause for Arrest—Confession—Voluntariness—Continued Questioning After Refusal to Discuss Particular Subject—Evidence—Other Crimes—Sentencing—Exclusion of Graphic Description of Electrocution Proper—Death Sentence Not Invalidated by Consideration of Non-Statutory Aggravating Factor

CARL ELSON SHRINER, Appellant,
v.
STATE OF FLORIDA, Appellee.
Case No. 51,749

May 22, 1980. An appeal from the Alachua County Circuit Court. Green, Judge. Case No. 76-822-CF.
Daniel T. O'Connell of O'Connell and Hulslander, Gainesville, Florida, for appellant. Jim Smith, Attorney General, and A. S. Johnston, Assistant Attorney General, Tallahassee, Florida, for appellee.

(PER CURIAM) Appellant, Carl Elson Shriner, was convicted of one count of murder in the first degree. The jury recommended and the trial judge imposed a sentence of death. Jurisdiction vests in this Court pursuant to article V, section 3 (b)(1), Florida Constitution. We affirm the conviction and sentence. [1]

The following facts came to light at trial. At approximately 1:30 a.m. on Friday, October 22, 1977, two young women entered a Gainesville convenience store (Majik Market). Two other persons were in the store at that time, the store clerk, Judith Carter, and a male customer. The women made their purchases ahead of the male customer and departed. The man was in his mid-twenties, of medium height, slender; he had a receding hairline, medium to dark brown collar-length hair, dark eyes, a mustache and a three-to-four-day-old beard.

At 6:15 a.m. the same morning, James Grills went into the Majik Market and discovered the dead body of Judith Carter. He summoned police who arrived at about 6:30 a.m. Gainesville police investigator Mason photographed the scene and recovered three projectiles from the store. Associate district medical examiner Clark later recovered two projectiles from the body.

Alachua County deputy sheriff Denson went on duty Saturday at 3:30 p.m., October 23, 1976, and received a be-on-lookout bulletin (BOLO) with a written description and two composite sketches attached. The description and sketches were based in part on information obtained from the two young women at the Majik Market and on an eye-witness account of an armed robbery which took place early Friday morning at an 8 Days Inn. At 4:00 p.m. that Saturday, Deputy Denson stopped opposite a car at a stop sign. The passenger in the car matched the description in the BOLO. Denson stopped the car, advised the passenger of his Miranda [2] rights and asked him some questions. After learning that the passenger had recently been released from prison, Denson took him into custody. The passenger was Carl Shriner.

Upon arrival at the Alachua County sheriff headquarters, detectives readvised appellant of his Miranda rights. Appellant signed in four separate places a form constituting an acknowledgment of understanding of Miranda rights, a waiver of the right to have an attorney present during questioning, a consent to be interviewed and a consent to make a statement. Shriner gave his local address as 1223 Northeast Eighteenth Avenue, where he and Carol Griffis lived at the home of John and Nancy Rapp. John Rapp was the driver of the car in which appellant was apprehended. Shriner had an Arizona driver's license bearing the name Carl Elson Shriner and the address 514 W. Buist, Phoenix, Arizona, and $338 in his wallet.

A gunman robbed the 8 Days Inn in Gainesville at about 3:00 a.m. Friday, October 22, 1976, [3] under the following circumstances. While waiting for the security guard to leave the immediate area, a man asked the clerk for a room and filled out a guest registration form. He robbed the clerk and took the form with him, but not before the clerk had removed two of the five copies. It was signed "Rob E. Williams, 514 W. Buist, Phoenix, Ariz." The motel clerk identified appellant as the culprit in a photo lineup and at trial. [4]

At the sheriff's office appellant signed a written consent to search the portion of the Rapp residence occupied by him. After John and Nancy Rapp consented in writing to a search of the remainder of their home, the police discovered a Smith and Wesson .38 caliber revolver hidden in a chair in the Rapp children's living room. FBI firearms identification expert Bollenbach took possession of the gun and the five projectiles found in the Majik Market and determined conclusively that the projectiles were fired from that gun. [5]

Appellant was taken to the Gainesville Police Department at 7:30 p.m., Saturday, October 23, 1976. He signed a waiver and consent form after being readvised of his Miranda rights. Numerous law enforcement officers and an assistant state attorney participated in the ensuing interrogation, which continued from 9:00 p.m. until 2:45 a.m. the following morning. Appellant first offered to Sergeant Blitch a number of inconsistent accounts of his knowledge of the murder and confessed only to the 8 Days Inn robbery. At approximately 1:00 a.m. Sunday, October 24, 1976, during questioning by assistant state attorney Nilon and with Blitch out of the room, Shriner made some equivocal statements evincing an apparent desire to terminate questioning about the 8 Days Inn robbery. [6] Nilon proceeded to other subjects and the interrogation continued. At 2:00 a.m., with Sergeant Blitch present, appellant confessed to the murder of Judith Carter.

Appellant presents a plethora of issues for our consideration, several of which do not merit discussion. His first colorable contention is that his arrest was illegal because of a lack of probable cause. We disagree. A law enforcement officer has probable cause to arrest if he has reasonable grounds to believe that the person arrested has committed a felony. State v. Outten, 206 So. 2d 392, 397 (Fla. 1968). The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based. Id. Here, the sketches attached to the police BOLO bore a striking resemblance to appellant, thus furnishing deputy Denson with reasonable grounds to believe that appellant had committed the robberies.

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NOTICE: Cases not final until time expires to file rehearing petition and, if filed, determined.

Of considerably greater difficulty whether, although otherwise voluntary, Shriner's confession must be suppressed because of his claim that the police persisted in questioning him after he indicated an unwillingness to answer questions on a particular subject. Appellant relies upon the following language in Miranda v. Arizona, 384 U.S. 436, 473-74:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. [Footnote omitted.]

Miranda required exclusion of any statements stemming from custodial interrogation unless the prosecution demonstrated compliance with its specific prophylactic safeguards.[7] If law enforcement officers fail to give the specified warnings before interrogation or fail to follow the Miranda guidelines during interrogation, the statement thus derived may be suppressed, even though otherwise "wholly voluntary." Michigan v. Mosley, 423 U.S. 96 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

In Michigan v. Mosley, police questioning was held proper even though the accused had earlier indicated his desire to remain silent. The Supreme Court rejected a strict rule which would totally preclude all further custodial interrogation.[8] At the same time it observed that to construe Miranda to require only a pause in questioning, with a resumption of interrogation after only a momentary respite, would effectively undermine the will of the accused:

> Clearly, therefore, neither this passage nor any other passage in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.
>
> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." 384 U.S., at 479. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Id., at 474. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends upon Miranda on whether his "right to cut off questioning" was "scrupulously honored."

423 U.S. at 102-04 (Footnotes omitted).

Turning to the facts here, it appears that during interrogation by assistant state attorney James Nilon, Shriner indicated a desire to stop talking about the 8 Days Inn robbery. At the hearing on the motion to suppress Nilon described the episode in this way:

Direct Examination:

> Q. During any of that period of time that you were in his presence did he ever ask to have an attorney present?
>
> A. No, sir, he did not.
>
> Q. Did he ever ask to stop talking or remain silent?
>
> A. Yes, to a certain extent. What he did, in the first conversation that I had with him after Investigator Blitch had left the room, particularly in reference to the 8 Days Inn robbery, he told me certain things that had happened in the 8 Days Inn robbery and when I asked him particularly about the gun that he used in the 8 Days Inn robbery he said to me something th the effect, "Well, right now it's like I'm crazy. It's like I'm nuts." I said, "Well, Mr. Shriner . . . " I don't remember what I said, but I said, "It's not like you mean you are insane." He said, "No." I said, "You mean you don't want to answer any more questions?" And he said, "Yes." I just sat there for a minute. I think at that point I asked him something about his family background and he answered that, and that's the only time I can think of he even alluded to the fact that he didn't want to answer any questions or make any further statements or anything.

TH100-101.

Cross-Examination:

> Q. All right. Let me go back to one of the statements that Mr. Shriner is giving—and it was kind of at the end of Mr. Hebert's direct examination—you said that during one of the times you were talking to Mr. Shriner concerning the weapon or the gun, he made the statement to you something about, "I'm crazy" or "Stop. I'm crazy."
>
> A. Yes, sir.
>
> Q. Kind of vague. We are not sure as to the terminology that was used. The word crazy was used, though.
>
> A. Crazy or nuts. "It's like I'm crazy or nuts." And I interpreted that to mean, "It's like I'm not really nuts, but for your sake and, you know, in answering these questions, further questions, it's like I'm nuts to you."
>
> Q. Was he saying he was just getting confused or tired?
>
> A. My impression was that he was saying, like, from now on out as far as concerning the gun and specifics of the 8 Days Inn robbery, it was like he was insane, that, you know, the answers would be like a crazy man. I got the impression he was saying, "Don't bother asking me any more questions about that."
>
> Q. I believe you said on direct examination—did he say, "I don't want to answer any more questions"?
>
> A. He never told me specifically like, "I don't want to answer any more questions," that I can remember.
>
> Q. Did you get the impression he didn't want to answer any more questions?
>
> A. About that part of the incident, yes, about the 8 Days Inn and where he got the gun and things of that nature and any more specifics, yes, but then we sat there for a minute or two and I asked him some other questions. I think it was about his personal . . .
>
> Q. About his family and personal things.

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A. Yes, and he just answered and . .e started another conversation and he had no problem.

TH107-108.

At trial Mr. Nilon offered this account:

Cross-Examination:

Q. At the point in time that you are talking to him now concerning the Eight Days Inn, I believe there was a little incident that took place, and you are talking to Mr. Shriner, and I believe that Mr. Shriner seemed to indicate to you that he did not want to talk, he was having problems. My understanding is did he use the words "I am crazy" or "I am having problems". Do you remember the thing that I am talking about?

A. Yes, I do.

Q. Okay. There was some problem at this point in time, was there not, in the interview room, that existed between Mr. Shriner and yourself as to this interrogation?

A. I don't know what you mean by a problem. There was a point in time that he made some of the statement that you are talking about.

Q. Can you be more specific about that, please?

A. Yes, I can. I had gotten some information from one of the investigators, and I can't tell you which one because there were a number of them, prior to going into the room concerning a piece of paper, I think it was a registration that the person who had committed the robbery had signed before he or as he was pulling the robbery giving an Arizona address.

I started questioning Mr. Shriner about signing the registration and did he sign his address or his parents' address, and he, I don't want to say smile, but he had kind of a smirk or a grin on his face and said that "I am crazy." I said, "Do you mean by that that you are actually, you know, out of your mind or crazy?" And I don't remember whether he answered that or not.

I said, "Well, you mean you don't want to answer any more questions about that?" And he said, "Yeah."

Q. Okay. But there was some problem at this point in time, he did not want to talk about it?

MR. HERBERT [state attorney]: The State objects, Your Honor. The words speak for themselves. What counsel calls a problem, the witness has already said that he doesn't know what that means but he is telling what happened.

MR. KEARNS [defense counsel]: I will rephrase the question, Your Honor.

THE COURT: The objection is moot by the question being withdrawn.

BY MR. KEARNS:

Q. He did not want to talk about that particular area, did he?

A. No, he did not.

Q. Now, based upon that response, did you inquire as to whether or not he wished to continue?

A. No, sir. At that point in time there was about a minute or two lull or lapse and that is when I started talking about personal things.

Q. Okay. Then you started going on about this personal family things?

A. Yes. At that point in time, during those conversations. I really terminated conversations about any offenses.

TT 720-722.

Redirect Examination

Q. Now, you mentioned that he mentioned to you that he didn't want to talk about it, he gave you an impression that he didn't want to talk about the specifics of the folio. Did he have any objections about going on and talking about other things?

A. Specific--I am sorry, I didn't understand.

Q. All right. Mr. Kearns talked about the thing called problems sometime--

A. Yes.

Q. --where the defendant said or you asked him about the folio, signing it, and he said, "I am nuts," and you said, "You just don't want to talk about it any more." You didn't talk to him any more about the folio; is that correct?

A. No, I dropped that subject.

Q. Okay. Did he have any problem talking about anything else?

A. No, sir.

Q. Did he ever say that he didn't want to talk about anything else?

A. No, sir.

Q. Did he freely and voluntarily answer other questions that you asked him?

A. Yes, sir. As I stated before, there was about a minute or two lull period where we just sat there and I said--well, I might have started something like, "Carl, where are you from?" And then we started about personal matters that I have already testified to.

Q. All right. Now, during that time when he was making the admissions of guilt to you, "I shot her, why I shot her," did he ever stop or tell you that he wanted to stop talking about it?

A. No, sir.

Q. Or that he wanted a lawyer?

A. No, sir.

TT 727-728.

Appellant testified in his own behalf at the motion to suppress but made no mention of any desire to terminate questioning.

We are satisfied that, based on Mr. Nilon's testimony and the absence of rebuttal evidence to the contrary, the trial judge correctly concluded that appellant wanted to terminate questioning only insofar as it related to the 8 Days Inn robbery. We are similarly satisfied that Mr. Nilon respected appellant's partial exercise of his Miranda privilege and restricted further questioning to other areas. Given this posture, the police did not run afoul of Miranda and Mosley by continuing the interrogation:

> When a person in custody has responded to proper police interrogation by voicing a general willingness to talk, subject only to a limited desire for silence, and his wishes not to discuss a particular subject-matter area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subjects. [9]

United States v. Vasquez, 476 F. 2d 730, 732-33 (5th Cir. 1973);

accord. Smith v. United States, 505 F. 2d 824 (6th Cir. 1974); United States v. Mathews, 417 F. Supp. 813 (E.D. Pa.), aff'd., 547 F. 2d 1165 (3d Cir. 1976), cert. denied, 429 U.S. 1111 (1977).

Hence, appellant's confession was properly admitted at trial.

Appellant next asserts error in the admission of evidence relating to the 8 Days Inn robbery. He properly cites Williams v. State, 117 So. 2d 473 (Fla. 1960), for the proposition that evidence of other crimes is inadmissible if offered solely for the purpose of showing bad character or propensity. However, Williams does permit evidence of other crimes

> if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of such other crimes would have a relevant or material bearing upon some essential aspect of the offense then being tried.

Ashley v. State, 265 So. 2d 685, 693 (Fla. 1972). Relevancy is the test; if the proffered evidence is relevant for any purpose other than to show bad character or propensity, it should be admitted. Id.

We concur in the trial judge's ruling that evidence of the 8 Days Inn robbery was admissible to prove identity. The following facts adduced at trial make apparent the relevancy of this evidence: (1) police found a .38 caliber gun and cartridges in appellant's residence; [10] (2) ballistics expert Bollenback identified the gun found in appellant's residence as the murder weapon; [11] (3) at 3:00 a.m., only ninety minutes after Judith Carter's murder, a man robbed the 8 Days Inn. The hotel clerk identified appellant as the culprit and testified that the gun used in the robbery closely resembled the murder weapon. [12] Thus, the evidence of the 8 Days Inn robbery, if believed by the jury, places the murder weapon in the hands of appellant within ninety minutes of Judith Carter's demise. Such evidence is clearly probative of the murderer's identity.

The remaining issues involve the sentencing phase of the trial. Appellant's constitutional attack on the death penalty has been thoroughly canvassed in prior decisions and found groundless. Proffitt v. Florida, 428 U.S. 242 (1976); Alford v. State, 307 So. 2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Equally meritless is the contention that it was error to exclude the testimony of a priest who had witnessed an execution by electrocution. While it is settled that an advisory jury and trial judge may consider evidence of mitigating factors beyond those enumerated in section 921.141 (6), F. S. (1977), [13] the evidence must be relevant to the sentencing inquiry. We do not believe that a descriptive account of an electrocution would aid the jury or judge in their effort to apply section 921.141 fairly and correctly. Indeed, such evidence would more likely serve to distort and obfuscate the sentencing process.

Appellant contends finally that his death sentence is fatally defective because the judge considered nonstatutory aggravating circumstances. The relevant portions of the judge's findings are as follows:

> The question occurs as to whether death or life imprisonment should be the verdict of this Court. Using the statutory guidelines of mitigating circumstances as opposed to aggravating circumstances, the Court finds under aggravating circumstances the following:
>
> 1. Whether the Defendant was under sentence of imprisonment when he committed the murder for which he was convicted. This cas does not fit this guideline.
>
> 2. Whether the Defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> The Defendant CARL ELSON SHRINER was convicted of the offense of Armed Robbery in Dade County in 1972. He served a five year sentence in the [illegible] for this act.
>
> 3. Whether in committing the murder for which he has just been convicted, the Defendant knowingly created a great risk of death to many persons. This guideline is not applicable to this case.
>
> 4. Whether the murder for which the Defendant was convicted was committed while he was engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive bomb or device.
>
> The evidence shows in this case that the Defendant killed Judith Ann Carter while perpetrating robbery.
>
> The following are statutory mitigating circumstances which have been considered:
>
> 1. Whether the Defendant has no significant history of prior criminal activity.
>
> 2. Whether the murder was committed while Defendant was under the influence of extreme mental or emotional disturbance.
>
> 3. Whether the victim was a participant in the Defendant's conduct or consented to the acts.
>
> 4. Whether the Defendant was an accomplice in the murder committed by another person and the Defendant's participation was relatively minor.
>
> 5. Whether the Defendant acted under extreme duress or under the substantial domination of another person.
>
> 6. Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> 7. The age of the Defendant at the time of the crime.
>
> The Court finds, with the possible exception of No. 6 above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case, found both in the presentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to represent this Defendant prior to trial, he has been diagnosed as a "sociopathic personality." An examination of these reports, however, does not lead one to the conclusion that his capacity is diminished thereby.
>
> The Court finds that the aggravating circumstances far outweigh the mitigating circumstances.
>
> In addition, an examination of the presentence investigation, which was made available in its entirety, including the confidential section, to the attorney for the Defendant prior to sentencing, indicates that during the Defendant's incarceration at the Department of Offender Rehabilitation, he has presented a discipline problem and to some degree a security risk. The investigation further shows that he has engaged in a long pattern of violent criminal conduct. In addition, it is apparent that the robbery that was committed in perpetration of the death of Judith Ann Carter was not the sole robbery committed by this Defendant subsequent to his release from prison some three weeks prior to the date of the offense.

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As a preliminary matter, the r[illegible]d is replete with evidence to support the judge's finding of aggravating circumstances numbered two and four.[14] The record also supports the finding of no mitigating circumstances. It is not clear, however, whether the judge considered appellant's disciplinary record as an aggravating circumstance. Even if we assume that the disciplinary problem was so treated, the error was harmless. We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation,[15] improper consideration of a nonstatutory factor does not render the sentence invalid:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circumstances become important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute.

Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977) (emphasis in original).

Accordingly, the judgment of guilt and the sentence of death are affirmed. It is so ordered. (England, C.J., Adkins, Boyd, Overton, Sundberg and Alderman, JJ., Concur)

---

1. References to specific pages in the record will be designated as follows: record on appeal, R; supplemental record on appeal, SR; Trial transcript, TT; red-bound transcript of 2/3/77 hearing, TH.
2. Miranda v. Arisona, 384 U.S. 436 (1966).
3. TT 641 4. TT 651, 655 5. TT 636
6. The facts surrounding this episode will be fully explored later in this opinion.
7. United States v. Charlton, 565 F.2d 86, 89 (6th Cir. 1977), cert. denied, 434 U.S. 1070 (1978).
8. Id.
9. We also concur with the Circuit Court's footnote no. 2 to the above statement, 476 F.2d at 733.

> We certainly do not intimate approval of any practice by which a suspect's express desire to remain silent as to some specific activity is aborted by the subterfuge of questioning which is designed or intended to indirectly gain information about those matters which he has indicated he wishes not to discuss.

However, this record is bare of any perfidious police practices. And considering the lack of contradictory evidence in Shriner's testimony at the motion to suppress, we would be irresponsible to overturn the trial judge's finding of voluntariness. See Cooper v. State, 336 So. 2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977).

10. TT 611.
11. TT 636.
12. TT 641-56.
13. See Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954; 57 L. Ed. 2d 973 (1978); Proffitt v. Florida, supra; Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).
14. Section 921.141 (5)(b) and (d), F.S. (1977).
15. "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overriden by one or more of the mitigating circumstances . . . ." State v. Dixon, 283 So. 2d at 9.

* * *

Criminal Law—Murder—Death Penalty—Exclusion of Propsective Jurors Who Could Not Vote to Impose Death Penalty Proper—Four Day Delay in Holding Sentencing Phase and Failure to Sequester Jury Not Denial of Due Process—Prosecutorial Discretion in Granting Immunity to Co-Perpetrator Does Not Render Death Penalty Unconstitutional

ERNEST CHARLES DOWNS,
Appellant,
v. CASE NO. 53,524
STATE OF FLORIDA,
Appellee.

* * * * * * * * * * * * * * * *

May 22, 1980. An appeal from the Duval County Circuit Court. Pate, Judge. Case No. 77-2874 Div. S.
Richard Lovett Brown, Jacksonville, Florida, for appellant.
Jim Smith, Attorney General, and Raymond L. Marky, Assistant Attorney General, Tallahassee, Florida, for appellee.

(PER CURIAM) Ernest Charles Downs was convicted of the murder in the first degree of Forrest Jerry Harris, Jr. The jury recommended that the death penalty be imposed, and, after weighing the aggravating and mitigating circumstances, the trial court imposed a sentence of death. Downs' conviction and sentence of death are before this Court on direct appeal pursuant to article V, section 3 (b)(1), Florida Constitution. Downs also appeals his conviction for conspiracy to commit first-degree murder. We have reviewed the record, considered the fifteen points raised on appeal, and have found no reversible error.

In April, 1977, John Barfield approached Downs with an offer of five thousand dollars if Downs would kill Harris. Downs accepted the contract to kill Harris and enlisted the assistance of Larry Johnson. On April 23, 1977, at Downs' insistence, Johnson phoned Harris and identified himself as Joseph Green, from whom Harris was expecting a call, and told Harris that he wanted to talk to him about flying contraband. They arranged a meeting in Jacksonville. Downs drove down a dirt road and left Johnson there to await Downs' return with Harris. Downs picked up Harris and drove to the location where he had left Johnson. Harris exited the car and approached Johnson at which time Downs shot Harris four times in the head with a .25 caliber automatic pistol. Together, Downs and Johnson dragged the body off the road into the bushes where Downs fired another shot into Harris' chest to make sure that he was dead.

Downs argues that his conviction should be reversed because the trial court erred in allowing into evidence a diagram prepared by Johnson outside the courtroom, because he was denied due process by the prosecutor's interruption of defense counsel during defense reply summation, because he was denied an impartial jury, because he was deprived of due process by not being allowed to videotape depositions, because his right to cross-examine a witness was curtailed, because he was deprived of his right to compulsory process for obtaining witnesses, because he was denied his fifth amendment right against self-incrimination, because he was denied due process by admission of a particular hypothetical question propounded by the prosecutor to the medical examiner, because the judge commented on the evidence, and because the evidence is insufficient to support the conviction.

For the most part, Downs' points on appeal are completely

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B

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, AUGUST 27, 1980

CARL ELSON SHRINER,	**	
Appellant,	**	CASE NO. 51,749
vs.	**	
STATE OF FLORIDA,	**	Circuit Court Case No. 76-822-CF (Alachua)
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

C
cc: Hon. A. Curtis Powers, Clerk
Hon. R. A. Green, Jr., Judge

Daniel T. O'Connell, Esquire
of O'Connell & Hulslander
A. S. Johnston, Esquire

IN THE CIRCUIT COURT OF FLORIDA
EIGHTH JUDICIAL CIRCUIT, IN AND
FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CARL ELSON SHRINER,

Defendant.

Case No. 76-822-CF

FILED

1977 APR 29 AM 9:29

SENTENCE

The Defendant, CARL ELSON SHRINER, was indicted by a Grand Jury of Alachua County, Florida, and charged with the first degree murder of Judith Ann Carter.

The case came on for trial and resulted in a verdict of Guilty of Murder in the First Degree. The Jury, upon further deliberation, returned an advisory sentence verdict of death.

During the course of the trial proceedings, the Defendant twice asked the jury to recommend death rather than life in prison. Upon sentencing, however, the Defendant retracted that request.

The facts of the case show that on the date of the occurrence, the deceased was a clerk in a local convenience store. The Defendant, after he robbed the deceased, shot her five times until she was dead. From the evidence adduced upon this trial, there is no doubt that the Defendant is guilty of the crime.

The question occurs as to whether death or life imprisonment should be the verdict of this Court. Using the statutory guidelines of mitigating circumstances as opposed to aggravating circumstances, the Court finds under aggravating circumstances the following:

1. Whether the Defendant was under sentence of imprisonment when he committed the murder for which he was convicted. This case does not fit this guideline.

2. Whether the Defendant has previously been convicted

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of another capital felony or of a felony involving the use of or threat of violence to the person.

The Defendant CARL ELSON SHRINER was convicted of the offense of Armed Robbery in Dade County in 1972. He served a five-year sentence in the Department of Offender Rehabilitation for this act.

3. Whether in committing the murder for which he has just been convicted, the Defendant knowingly created a great risk of death to many persons. This guideline is not applicable to this case.

4. Whether the murder for which the Defendant was convicted was committed while he was engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive bomb or device.

The evidence shows in this case that the Defendant killed Judith Ann Carter while perpetrating robbery.

The following are statutory mitigating circumstances which have been considered:

1. Whether the Defendant has no significant history of prior criminal activity.

2. Whether the murder was committed while Defendant was under the influence of extreme mental or emotional disturbance.

3. Whether the victim was a participant in the Defendant's conduct or consented to the acts.

4. Whether the Defendant was an accomplice in the murder committed by another person and the Defendant's participation was relatively minor.

5. Whether the Defendant acted under extreme duress or under the substantial domination of another person.

6. Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. The age of the Defendant at the time of the crime.

The Court finds, with the possible exception of No. 6 above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case, found both in the presentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to represent this Defendant prior to trial, he has been diagnosed as a "sociopathic personality". An examination of these reports, however, does not lead one to the conclusion that his capacity is diminished thereby.

The Court finds that the aggravating circumstances far outweigh the mitigating circumstances.

In addition, an examination of the presentence investigation, which was made available in its entirety, including the confidential section, to the attorney for the Defendant prior to sentencing, indicates that during the Defendant's incarceration at the Department of Offender Rehabilitation, he has presented a discipline problem and to some degree a security risk. The investigation further shows that he has engaged in a long pattern of violent criminal conduct. In addition, it is apparent that the robbery that was committed in perpetration of the death of Judith Ann Carter was not the sole robbery committed by this Defendant subsequent to his release from prison some three weeks prior to the date of the offense.

Upon being asked in open court if the Defendant had any cause to show why the sentence of the law should not be pronounced, and having said nothing sufficient, IT IS THE ORDER AND JUDGMENT OF THIS COURT THAT

YOU, CARL ELSON SHRINER, BE SENTENCED TO DEATH IN THE ELECTRIC CHAIR. IT IS THE ORDER, JUDGMENT AND SENTENCE OF THIS COURT THAT YOU BE TAKEN BY THE PROPER AUTHORITIES TO THE FLORIDA STATE PRISON AND KEPT THERE IN CLOSE CONFINEMENT UNTIL THE DATE YOUR EXECUTION IS SET, THAT ON SUCH DAY YOU SHALL BE PUT TO DEATH BY HAVING ELECTRICAL CURRENTS PASS THROUGH YOUR

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BODY IN SUCH AMOUNTS AND FREQUENCY UNTIL YOU ARE RENDERED DEAD.

The Defendant is advised that the case will be appealed directly to the Florida Supreme Court and the Public Defender of the Eighth Judicial Circuit is hereby appointed to represent the Defendant for purposes of appeal.

DONE AND ORDERED in open court at Gainesville, Alachua County, Florida this 29th day of April, 1977.

R. A. GREEN, JR.
CIRCUIT JUDGE

Copies to:
Counsel of Record

CHAPTER 919. CONDUCT OF JURY

919.01 to 919.22 Repealed by Laws 1970, c. 70-339, § 180

For superseding provisions contained in 1972 Florida Rules of Criminal Procedure, see, now, Rules 3.370, 3.391 et seq.

CHAPTER 921. SENTENCE

Sec.
921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement [New].

Sec.
921.241 Felony judgments; fingerprints required in record [New].

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based

upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, eff. Dec. 8, 1972. Amended by Laws 1974, c. 74-379, § 1, eff. Oct. 1, 1974; Laws 1977, c. 77-104, § 248, eff. Aug. 2, 1977; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1979, c. 79-353, § 1, eff. July 3, 1979.

Laws 1972, c. 72-724, § 9, substantially rewrote this section.

Laws 1974, c. 74-379, § 1, added the third sentence to subsec. (1).

Laws 1977, c. 77-104, a revisor's bill corrected errors and deleted obsolete or expired provisions. See Revisor's Note—1977.

Laws 1977, c. 77-174, a revisor's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

Laws 1979, c. 79-353, substituted in the fifth sentence of subsec. (1) "to the nature of the crime and the character of the defendant" for "to sentence", deleted in subsecs. (3)(b) and (3)(b) "as enumerated in subsection (6)", and added subsec. (5)(i).

Revisor's Note—1977:

Conforms internal references to editorial reassignment of subsections created by s. 9, ch. 72-724, Laws of Florida.

least quarterly to discuss safety problems within state government, to attempt to find solutions for these problems and, when possible, to assist in the implementation of the solutions.

(3) The council shall report annually to the Governor and the Legislature, by January 15 preceding any regular legislative session, any actions taken to prevent job-related employee accidents, together with suggestions of safeguards and improvements.

Section 2. Subsections (3), (4), (5), and (6), of section 633.081, Florida Statutes, are hereby repealed.

Section 3. This act shall take effect October 1, 1979.

Approved by the Governor July 3, 1979.

Filed in Office Secretary of State July 5, 1979.

CRIMES AND OFFENSES—CAPITAL PUNISHMENT

CHAPTER 79-353

Senate Bill No. 523

An act relating to capital punishment; amending s. 921.141(1), (2), (3), (5), Florida Statutes; providing that evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant at sentencing proceedings on the issue of the penalty for a defendant convicted or adjudicated guilty of a capital felony; specifying grounds upon which the jury renders an advisory sentence to the court; specifying findings upon which the court imposes the sentence of death; providing an additional circumstance which the court or the jury must consider as an aggravating circumstance; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1), (2), (3) and (5) of section 921.141, Florida Statutes, are amended to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be

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presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as ~~enumerated in subsection (6),~~ which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, ~~as enumerated in subsection (6),~~ to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or

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flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony (homicide) was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Section 2. This act shall take effect upon becoming a law.

Approved by the Governor July 3, 1979.

Filed in Office Secretary of State July 5, 1979.

SCHOOLS—FOOD SERVICE PROGRAM—FUNDING

CHAPTER 79-354

Senate Bill No. 531

An act relating to school food service programs; amending s. 228.195(4), Florida Statutes; changing the formula for determining the level of state support for the district school food service programs; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (4) of section 228.195, Florida Statutes, is amended to read:

228.195 School food service programs.--

(4) ~~LEVEL--OF~~ STATE SUPPORT.--The state shall provide the state National School Lunch Act matching requirements. The funds provided shall be distributed in such a manner as to comply with the requirements for state matching under the National School Lunch Act. ~~per--meal difference,--when-the-computed-cost-of-meals-served-to-economically-needy children-exceeds:~~

~~(a)--Income-from-federal-sources,-and~~

~~(b)--Receipts-from-the-sale-of-reduced-price-meals.~~

~~The--computed--cost--of--meals--shall--not--exceed--the-necessary-cost-of obtaining,-preparing,-and-serving-such-meals-as-prescribed-by-regulations of-the-state-board.~~

Section 2. This act shall take effect July 1, 1979.

Approved by the Governor July 3, 1979.

Filed in Office Secretary of State July 5, 1979.

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